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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 286.

THE STEAM-TUG "E. A. PACKER," HER ENGINES, &c., JOHN SCULLY, CLAIMANT, APPELLANT,

vs.

THE NEW JERSEY LIGHTERAGE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 27, 1900.

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either steam-tug, but that they both continued on their respective courses, so that the barge in tow of said steam-tug E. A. Packer was run into said barge Atlanta, striking her on the port side just forward of midships, breaking a large hole in her and causing her to fill so rapidly that to render the damage to cargo as small as possible she was run ashore at the Battery just below Castle Garden.

3 Third. That said collision was caused solely by the negligence of those in charge of each of said steam-tugs in that they did not give proper and timely signals to each other and approached too close to each other to pass in safety and approached each other at too great a rate of speed and did not pass each other in safety, as they could easily have done at the place in question, where the channel is wide and there was no obstruction in the way, without any carelessness or negligence on the part of those in charge of said barge Atlanta or of said coal barge.

Fourth. That by reason of said collision this libellant has suffered damage in the injury to said barge Atlanta in the sum of about fifteen hundred dollars, and that said cargo has sustained injury to the amount of about six thousand dollars, which this libellant, as common carrier thereof, claims to recover in this cause.

Fifth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this court, and said steam-tugs are now within this district.

Wherefore libellant prays that process in due form of law may issue against said steam-tug Dr. John Wolverton, her engine, &c., and E. A. Packer, her engine, &c., and that all persons having any interest therein may be cited to appear and answer all the matters aforesaid, and that this court will decree that libellant recover its damages sustained as aforesaid, with costs, and that said steam-tugs be condemned and sold to pay the same, and that libellant may have such other and further relief as may be just.

J. B. GADDIS,
Prest. N. J. Lighterage Co.

Sworn to before me this 29th day of November, 1880.

WYLLYS BENEDICT,
Notary Public for Kings Co.

[L. S.]

Certif. filed in N. Y. Co.

BENEDICT, TAFT & BENEDICT,
Libellant's Proctors.

R. D. BENEDICT, *Advocate.*

Endorsed: 29296. U. S. district court, S. D. of N. Y. The New Jersey Lighterage Company *v.* The Steam-Tugs Dr. John Wolverton and E. A. Packer, &c., &c. Libel $7,500, collision. Benedict, Taft & Benedict, libellant's proctors, 64 Wall street, New York, N. Y. Process not to issue as to the Packer at present. Oct. 29, '80. B., T. & B. Filed Oct. 29th, 1880.

Mr. McCarthy, counsel for the claimant, reads the answer
4 as follows:

To the Honorable William G. Choate, judge of the district court of the United States in and for the southern district of New York:

The answer of John Scully, merchant, of South Amboy, New Jersey, claimant and sole owner of the steam-tug "E. A. Packer," her engines, tackle, apparel, and furniture, to the libel and complaint of the New Jersey Lighterage Company, in a cause of collision, civil and maritime, alleges:

First. He has no knowledge of the matters alleged in the first article of the libel aforesaid and denies the same to be true.

Second. He admits that a collision occurred whereby the barge Atlanta was somewhat injured at the time and not far from the place set forth in the aforesaid libel.

Third. He also admits and herein will specifically charge that the steam-tug "Dr. John Wolverton" was negligent in respect of navigating her tow, the barge "Atlanta," and that such negligence was the sole proximate cause of the collision.

Fourth. He alleges that the truth in respect of said collision, the circumstances surrounding it and the immediate cause, to be as follows—that is to say: On the day in question the tug E. A. Packer, being well manned, properly equipped, and in all respects seaworthy, had brought a tow of loaded boats from Port Johnson to New York. She had taken her tow up the North River, discharging boats at different places; her last landing in the North River was pier 9; from pier 9 she proceeded to go down the North River, round the Battery and then up the East River as far as 61st street, where she was to discharge the last boat in her tow.

When she left pier 9 she had but one boat in tow, to wit, Cross Creek barge No. 5, which was heavily loaded with coal. This barge was securely lashed to her port side.

It became necessary for her, in rounding the Battery, to keep quite close to the New York shore, because at that time, which was between four o'clock and one-half past four o'clock p. m., the tide was running out of the East River and sweeping around the Battery with a strong current, so that it would have been very difficult for the Packer to have held up with her tow if far out in the stream. The Packer was going at the rate of not more than three or four miles through the water. As she was rounding the Battery she was not more than two hundred yards, or about that distance, from the New York shore. She was making very
5 little headway past the land, it being found very difficult to make head with her tow against the tide. As she was rounding the Battery and when opposite or about opposite pier 1, East River, she saw some distance ahead—at least five hundred yards ahead—the steam-tug Dr. John Wolverton having in tow on a hawser a barge which your claimant believes to have been the barge Atlanta. The Wolverton and her tow were coming down and partly across the East River and were feeling the full sweep of the tide. The Wolverton was much nearer the middle of the stream

either steam-tug, but that they both continued on their respective courses, so that the barge in tow of said steam-tug E. A. Packer was run into said barge Atlanta, striking her on the port side just forward of midships, breaking a large hole in her and causing her to fill so rapidly that to render the damage to cargo as small as possible she was run ashore at the Battery just below Castle Garden.

3 Third. That said collision was caused solely by the negligence of those in charge of each of said steam-tugs in that they did not give proper and timely signals to each other and approached too close to each other to pass in safety and approached each other at too great a rate of speed and did not pass each other in safety, as they could easily have done at the place in question, where the channel is wide and there was no obstruction in the way, without any carelessness or negligence on the part of those in charge of said barge Atlanta or of said coal barge.

Fourth. That by reason of said collision this libellant has suffered damage in the injury to said barge Atlanta in the sum of about fifteen hundred dollars, and that said cargo has sustained injury to the amount of about six thousand dollars, which this libellant, as common carrier thereof, claims to recover in this cause.

Fifth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this court, and said steam-tugs are now within this district.

Wherefore libellant prays that process in due form of law may issue against said steam-tug Dr. John Wolverton, her engine, &c., and E. A. Packer, her engine, &c., and that all persons having any interest therein may be cited to appear and answer all the matters aforesaid, and that this court will decree that libellant recover its damages sustained as aforesaid, with costs, and that said steam-tugs be condemned and sold to pay the same, and that libellant may have such other and further relief as may be just.

J. B. GADDIS,
Prest. N. J. Lighterage Co.

Sworn to before me this 29th day of November, 1880.

WYLLYS BENEDICT,
[L. S.] *Notary Public for Kings Co.*

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First. He has no knowledge of the matters alleged in the first article of the libel aforesaid and denies the same to be true.

Second. He admits that a collision occurred whereby the barge Atlanta was somewhat injured at the time and not far from the place set forth in the aforesaid libel.

Third. He also admits and herein will specifically charge that the steam-tug "Dr. John Wolverton" was negligent in respect of navigating her tow, the barge "Atlanta," and that such negligence was the sole proximate cause of the collision.

Fourth. He alleges that the truth in respect of said collision, the circumstances surrounding it and the immediate cause, to be as follows—that is to say: On the day in question the tug E. A. Packer, being well manned, properly equipped, and in all respects seaworthy, had brought a tow of loaded boats from Port Johnson to New York. She had taken her tow up the North River, discharging boats at different places; her last landing in the North River was pier 9; from pier 9 she proceeded to go down the North River, round the Battery and then up the East River as far as 61st street, where she was to discharge the last boat in her tow.

When she left pier 9 she had but one boat in tow, to wit, Cross Creek barge No. 5, which was heavily loaded with coal. This barge was securely lashed to her port side.

It became necessary for her, in rounding the Battery, to keep quite close to the New York shore, because at that time, which was between four o'clock and one-half past four o'clock p. m., the tide was running out of the East River and sweeping around the Battery with a strong current, so that it would have been very difficult for the Packer to have held up with her tow if far out in the stream. The Packer was going at the rate of not more than three or four miles through the water. As she was rounding the Battery she was not more than two hundred yards, or about that distance, from the New York shore. She was making very little headway past the land, it being found very diffi-
5 cult to make head with her tow against the tide. As she was rounding the Battery and when opposite or about opposite pier 1, East River, she saw some distance ahead—at least five hundred yards ahead—the steam-tug Dr. John Wolverton having in tow on a hawser a barge which your claimant believes to have been the barge Atlanta. The Wolverton and her tow were coming down and partly across the East River and were feeling the full sweep of the tide. The Wolverton was much nearer the middle of the stream

than was the Packer, being several hundred feet further away from the New York shore. The barge Atlanta, in tow of the Wolverton as aforesaid, did not follow her tug in a direct line or on the very same course, but was swept by the tide considerably further out into the stream than was the tug.

The hawser line from the Wolverton to her tow was about one hundred and eighty feet long.

It was apparent at once to the persons in charge of the Packer that she, the Packer, could not port her wheel and go to the right of the Wolverton and her tow. The Wolverton was coming on at the rate of at least seven miles per hour past the land, and she was so far out in the river that even had the Packer been unencumbered with a tow it would have been impossible to clear the barge Atlanta by going off on a port wheel, but as the tide was then running, loaded down as the Packer was with a heavy tow, any movement to the right would have rendered a collision with the Wolverton inevitable. At this time there were two men in the pilot-house of the Packer and a lookout forward on deck.

One of the men in the pilot-house was a regular licensed pilot. Accordingly, when the tugs were at least 500 yards apart and when the tug Wolverton had really nothing to do but keep her course in order to avoid a collision, the tug Packer blew loudly and distinctly two whistles. This signified that she, the Packer, would keep her wheel starboard and go to the left—that is, between the Wolverton and the New York shore, which was the only course possible for her to take. The Wolverton made no reply whatever to these whistles, neither did she change her course or slacken her speed. Whereupon the Packer, after the lapse of but a few seconds, again blew two whistles, this time sharply and quickly. The Wolverton paid no attention to these, neither did she slacken her speed, but she did change her course somewhat in that she seemed to be making in more for the New York shore, as if with the intention of running under the Packer's bow and passing between her and the New York shore.

It then became evident that a collision was imminent with the Wolverton or with her tow, because, although the Wolverton might pass under the Packer's bows, the tow Atlanta, swinging as she did with the tide, could hardly do so.

6 Accordingly the headway of the Packer was stopped, her engines were reversed, and she began slowly to go back. The Wolverton coming on passed under her bows quite narrowly and passed down on the port side of the Cross Creek barge without touching her, but the barge Atlanta was not able to do so. While crossing the bows of the Packer and her tow her port side came in contact with the stem of the barge and received some injuries above her water line.

The foregoing are the facts of the collision in the libel set forth and the statement of facts in the libel contained except in so far forth as they agree with this answer are untrue.

Fifth. Your claimant charges that the whole fault of the said col-

lision is attributable to the tug Dr. John Wolverton and to her tow, the barge Atlanta, on the following respects:

1st. The tug Wolverton did not have a good and sufficient look-out.

2d. The tug Wolverton was in fault in towing her barge on a hawser when the tide was so strong and around a point of so much danger as the Battery.

3d. The tug Wolverton was in fault in not heeding the signal whistles of the Packer.

4th. It was gross carelessness in the tug Wolverton to attempt to pass the Packer on her port side, it being evident that if she did so her tow would swing against the Packer or her barge, and there being, moreover, every facility for the Wolverton to keep to the right—that is to say, further in the stream.

5. The tug Wolverton was going at too high a rate of speed.

6. The barge Atlanta was in fault for not having kept clear of the creek barge, as she might have done had she been properly steered. She was also in fault in not casting off her hawser before the collision occurred.

Sixth. Your claimant further alleges that the tug Packer was in nowise to blame for the said collision. She took every means to avoid it that was possible and she took them in time. She was moving very slowly and carefully and had been doing so ever since she first felt the ebb tide.

Seventh. Your claimant, further answering, alleges that the damages in this case were grossly and needlessly heightened by the careless conduct of the persons in charge of the lighter or barge Atlanta and of her cargo. She was not full loaded, and her cargo might very easily have been shifted from the port side to the starboard side and escaped contact with the salt water. She, the lighter, was beached in an improper place.

After she was beached no care was taken to save her cargo for several hours. The injury she received was on her port side and above the water line, and nothing but carelessness in those who controlled her led to the destruction of so much of her cargo as it is alleged was destroyed.

Wherefore your claimant prays that this honorable court
7 would be pleased to pronounce against the said libel and to condemn the libellant in costs and otherwise law and justice administer in the premises.

JOHN SCULLY.

Sworn to before me this 11th day of November, 1880.

JAMES H. ELLIOT,
Notary Public, New York County.

[SEAL.]

EDWARD D. McCARTHY,
Claimant's Proctor.

And also reads the opinion and decree of the district court:

8 *Opinion.*

BROWN, *J.:*

The libel in this case was filed to recover damages for the loss of the barge Atlanta, which was sunk in a collision with a boat in tow of the E. A. Packer upon her port side, at about four o'clock in the afternoon of October 25, 1880, off pier 1 or 2 in the East River.

The Atlanta had been lying at Roberts' stores, three piers above the Wall Street ferry, on the Brooklyn side. She was taken in tow by the steam-tug Wolverton on a hawser of about 20 fathoms and was bound up the North River. The tide was about half ebb and strong. The Wolverton, after hauling the Atlanta away from the dock at Roberts' stores and getting straightened down the East River, was put upon a course heading down and somewhat across the East River towards a point a little below Communipaw, on the Jersey side, and so as to clear pier 1, according to the testimony of Schultz, her pilot, by about 600 feet and the Battery by about 700 feet. Schultz further testifies that this course was kept unchanged until he heard two whistles from the Packer, when he put his helm hard aport and changed his course some four or five points, heading in towards the New York shore. The Packer was also headed somewhat towards the same shore. The Wolverton crossed the bows of the Packer, clearing her by some 12 or 15 feet, but the Atlanta, which was about 100 feet astern, was struck just forward of amidships on her port side by the tow of the Packer and speedily sank. Upon a libel filed in the district — of the eastern district of Pennsylvania against the Wolverton by the master of the Packer's tow to recover her damages arising out of this collision it was contended on the part of the Wolverton that the two tugs approached each other port to port—that is to say, that the

9 Packer was outside and further off from the New York shore than the Wolverton, and that the two were on courses which, if kept, would have cleared each other by the Packer's going astern of the Wolverton. The libel in that case was dismissed on the ground, as I understand, that this theory of approach was not disproved. The Wolverton, 13 Fed. Rep., 44.

By the undeniable weight of evidence in this case that theory is untenable and is proved to be untrue. Of all the witnesses on both sides Capt. Schultz alone maintains it. It is clearly inconsistent with the situation as undubitably established by other proof, and is substantially abandoned by the libellant's counsel.

For the claimants it is contended that the two tugs, at the time when they were first seen to each other and when the first signal of two whistles was given by the Packer, were approaching each other starboard to starboard—that is, that the Packer was heading up the East River in the eddy off the barge office, and then being within 200 to 400 feet of the New York shore, while the Wolverton was much further out in the river, heading somewhat quartering across the river, but still downwards and outside of the Packer. The libel-

lant's counsel, though not denying the weight of evidence shows that the Packer had the Wolverton on her own starboard bow, still contends that the Wolverton had the Packer on her port bow, and that the Wolverton had therefore the right of way, and that the Packer was bound to keep out of the way. The testimony on this point is more than usually embarrassing, not merely from the contradictions between different witnesses, but from the inconsistencies, contradictions, and corrections by several of the most important witnesses on each side in their own testimony. It would not be profitable to point these out in detail. Both counsel have sufficiently commented upon them. Almost any theory of the case can be maintained by taking detached portions of the testimony. I shall only state some of the points which I think best established:

10 1. Both the tugs were navigating in violation of the statutes of this State in passing so near to the Battery; but as they were visible to each other in ample season to avoid the collision and as there was plenty of room for them to avoid each other where they were, the violation of the statute is not deemed a proximate cause of the accident, and is therefore regarded as immaterial. The Maryland, 19 Fed. Rep., 551, 556; The Fanita, 8 Ben., 11.

2. The collision took place between piers 1 and 2, and probably not over 300 feet off from the latter.

3. The Packer, with a heavy tow on her port side, had come down the North River and rounded within 300 or 400 feet of the Battery, and probably less than that distance, according to the prevailing custom of boatmen, in order to avail herself of the eddy there, intending to pass through this eddy and to keep close in by the piers beyond. She passed the barge office, probably within 400 feet of it, under a starboard wheel, so as to keep along by the piers, and so as to draw nearer to the longer piers beyond. She was moving slowly, at the rate of not more than a couple of miles per hour by land, while the Wolverton, with a strong ebb tide, was moving by land at about the rate of eight miles per hour. The two tugs were seen by each other, according to the testimony of the pilots of each, when about 400 or 500 yards apart. Before the collision the Packer's engines were reversed, and at the time of the collision she was not probably making any headway. The distance of 400 or 500 yards between the two when first seen would be passed over in about a minute and a half. During that time the Packer, considering her slow motion and the backing of her engines during the latter part of this interval, could scarcely have made more than about 300 feet progress; and this agrees with her evidence as to the place from which she first saw the Wolverton, viz., off the barge office.

11 The Wolverton did not back at all, but kept on at full speed, and she must have gone during the same time from 900 to 1,200 feet.

4. In reaching the point of collision from the place where she first saw the Wolverton it is clear that the Packer could not have much shortened her distance from the New York shore, both because she could not have gone much over 300 feet altogether during the interval, and because in the edge of the slack water, where she then

was, the slight ebb tide against her operated to lessen the effect of her starboard wheel. The libellants' counsel contends, even, that through this effect of the ebb tide she was actually heading outwards and away from the shore. This does not accord with the evidence and does not seem to me probable. Several of the libellants' own witnesses testified to the Packer's heading in somewhat towards the New York shore. At most, however, the Packer, in passing over some 300 feet, could have neared the New York shore but little, although in approaching pier 2 she would come much nearer to it than to pier 1, as pier 2 projects about 75 or 100 feet further out into the water.

5. On the other hand, it is certain, from the testimony of the witnesses on both sides, that the Wolverton, when the Packer was first seen about 400 or 500 yards distant, must have been far out in the East River, at least one-third of the distance to the Brooklyn shore, and in the full sweep of the ebb tide. That distance back from the place of collision would place her there.

6. The Wolverton's course, as given by her pilot and wheelman, would carry her outside of the Packer's line of approach, making them starboard to starboard when first seen. Considering the gross error of the pilot, Schultz, in testifying that the Packer, when first seen, was further out in the river than the Wolverton; that the tugs approached port to port, and that the Packer seemed to have come from the vicinity of Bedloe's Island and not around the Bat-
12 tery, I attach little weight to his evidence on these disputed points. It is not impossible that in his testimony he has confounded the situation of the Packer with that of another tug outside of her; that it was not the Packer which he saw 400 or 500 yards distant, but the other tug more in the direction of Bedloe's Island, and that he did not see the Packer till afterwards, when she was much nearer to him. But there is no reason to discredit his testimony as to the course which he took and kept up to the time of his "rank sheer" after the Packer's whistles. That course, he says, was headed for "a little below Communipaw," after straightening down the river from Roberts' stores. From that point, after straightening down the river, the course testified to, so as to "clear the Battery by some 700 feet," would have brought the Packer upon the Wolverton's starboard bow, unless the Packer were more than 500 feet off from the barge office, which was not the case, as the place of collision proves. The Wolverton reached the place of collision only after a sheer of four or five points. She passed the Packer's tow only about 20 feet off, and I regard it as in the highest degree improbable, therefore, when the Packer was first seen or ought to have been seen—*i. e.*, before the Wolverton ported—that the Packer was to any appreciable extent on the Wolverton's port bow. She must have been either on the Wolverton's starboard bow or nearly ahead, as several of the witnesses testify. Schultz's testimony that the Packer was at no time on his starboard bow cannot be true. If he ported to go to the right of the other tug, above referred to, before seeing the Packer that would explain some of his testimony, though it would introduce other contradictions.

7. Much of the contradiction in the testimony may be explained by the different times at which the observations of the witnesses may have been made. There is no question that after the Wolverton made her sheer towards the New York shore she had the
13 Packer upon her own port bow. Several of the witnesses who testified, including the wheelmen of the Wolverton and of the Atlanta, did not see the Packer until after this sheer was made. Their evidence on this point is therefore irrelevant. I do not mean to say that all of the evidence on the part of the libellants can be harmonized in this way. Plainly it cannot be.

8. The cause of the collision, in my judgment, was the determination of Captain Schultz, of the Wolverton, to run into the eddy ahead of the Packer and between her and the New York shore instead of keeping his former course and passing outside of and astern of the Packer, as that course would have carried him had the Packer been allowed to keep on under her starboard wheel. The testimony of the libellants' witnesses as to having the Packer two or three points on their port bow is, I think, founded upon the picture in their minds of the situation after it became noticeable and dangerous through the sheer given by the Wolverton in order to get into the eddy across the Packer's bows.

9. Assuming that the Wolverton had the Packer either directly ahead or even a little on her own port bow before she ported her wheel, I am of opinion that under the peculiar circumstances of navigation around the Battery the pilot of the Wolverton had no right to attempt to go inside the Packer as he did or to change her course to starboard, and that the Packer being in the slack water when first seen and near the shore, far inside of the Wolverton, had a right to retain that position as respects the Wolverton and properly kept to port under a starboard wheel, with a signal of two whistles, and that her subsequent conduct was without fault. The Wolverton, in crossing the river and attempting to run across the tide into the eddy between the Packer and the New York shore, would necessarily cause her tow, astern on a hawser, to swing round outwards with the tide and present a longer front to boats coming in the
14 opposite direction. Such a manœuver would evidently be very hazardous to her tow, rendering it difficult, if not impossible, for the Packer to escape her. The Packer might, it is true, on first seeing the Wolverton, have gone right out from the eddy into the East River tide, and thus have got around the Atlanta; but the tide in that case would have swept her round and far astern of her course. The custom of navigation about the Battery has determined against any such unnecessary and unreasonable navigation as that on the part of a tug which is already in the eddy, going eastward near the shore. The evidence shows clearly, in my judgment, that the prevailing custom in navigating around the Battery on the ebb tide, where a tug and tow are going eastward in the slack water near the barge office and another tug, with a tow on a hawser, is coming down the East River and bound up the North River, but much further out in the stream, requires the latter to keep off from the former and not to attempt to run between the

former and the shore in order to get into the eddy, but to go outside and astern of the other tug. The libellants' witnesses do say that it is customary for tugs going either way to hug the shore; but none of them assert that in the situation of the two tugs, as above described and as I have found it, the Wolverton could properly endeavor to run in near shore as she did; while several of them and all of the respondent's witnesses justify the Packer in her course in the situation described. This usage is founded upon the manifest considerations of prudence and convenience above stated. This usage must have been known to the pilot of the Wolverton. The statute did not entitle him to run towards the shore inside of the Packer, as he did, but forbade it; and the settled usage as well as the most obvious prudence also forbade it. The pilot of the Packer, being already very near the shore when the Wolverton was sighted, had a right to rely on the Wolverton observing this usage
15 under the peculiarities of navigation around the Battery. Being near the shore, it was his duty to keep there and to navigate precisely as he did, giving, as he did, the appropriate signals of two whistles. The ordinary rules of navigation do not apply to such a case. It falls within statute rule 24 and the exceptions to the inspector's rules (page 38), which for good reason permit going to the left and require the other vessel to navigate accordingly. The circumstances here did furnish good reason for going to the left and justified the Packer's course. The pilot of the Wolverton knew it or ought to have known it, and he was bound to accept without hesitation the first signal of two whistles given by the Packer in time, and to pass to the left, which the result shows he could easily have done. In fact, the testimony of Schultz himself and the ground upon which he justifies his conduct serve to confirm the view above taken. He does not claim that he would be justified in running between the Packer and the shore if the Packer were already near the shore, in the eddy, and heading towards the piers; and that is the situation as I find it. His defense is upon the ground that the Packer was, in reality, further out in the stream than the Wolverton, and that the two were approaching port to port—and that is the claim in the libel; a wholly different situation, which, as I find, the evidence in this case disproves.

10. Nor can I doubt that had the Wolverton merely kept her own course without change the collision would have been avoided. The Atlanta was struck after she had ported her helm and passed some distance on that course. This alone, I think, shows that had the Wolverton and Atlanta kept their previous course and allowed the Packer to keep on to port they would have gone on clear to the left. The Packer, in giving two whistles and keeping to the left, had the right to assume that the Wolverton would at least keep her course and not sheer to the right. But by the Wolverton's porting the Packer was compelled to stop, and the
16 collision was thus brought about. Though the Packer was navigating where she had not by statute any right to be, still this, as I have said, in no way contributed to the collision. The positions of both tugs were perfectly well known to each other in ample

season to avoid any collision. The Packer, being near the shore, was navigated according to the prevailing usage and without any fault that I can perceive. Being near the shore, usage and common prudence required her to keep there, as respects the Wolverton, which was far out in the stream; while the latter was bound by the same usage and prudence to pass outside without reference to her particular heading in crossing and coming down the river. The collision was, in my judgment, solely the fault of the Wolverton in persisting in an unauthorized and dangerous attempt, which the Packer could not have anticipated, to run into the eddy between the Packer and the shore. When this was seen to be pertinaciously adhered to on the Wolverton's part the Packer gave way and endeavored to avoid the collision, but without avail. As I cannot find any fault on her part, the libel must be dismissed with costs.

17 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 13th day of May, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Addison Brown, district judge.

THE NEW JERSEY LIGHTERAGE COMPANY
v.
THE STEAM-TUG E. A. PACKER, HER ENGINES, &c.

This cause having been duly heard on the pleadings and proofs and argued and submitted on briefs and points by the advocates for the respective parties, and due deliberation being had in the premises—

Now, on motion of Edward D. McCarthy, Esq., proctor for claimant herein, it is—

Ordered, adjudged, and decreed that the libel in the above-entitled cause be, and the same hereby is, dismissed, on the merits, with costs, taxed at the sum of $140.33, against the libellant.

And it is further ordered that, unless an appeal be taken from this decree within the time limited by law and prescribed by the rules and practice of this court, the stipulators for libellant's costs forthwith pay into the registry of this court the amount of their stipulation, and that upon said payment thereof the clerk distribute the proceeds in satisfaction of the taxed costs of the claimants herein.

ADDISON BROWN.

18 The counsel for the libellant and claimant read in evidence the following testimony as contained in the apostles or record from said district court:

Testimony for the Libellant.

FREDERICK PARKER, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. BENEDICT:

Q. Where do you live?
A. In 59 Henry street, New York.
Q. What is your business?
A. Lighterman.
Q. How long have you been a lighterman?
A. Since 1859.
Q. Do you know the barge Atlanta?
A. Yes, sir.
Q. Were you attached to her in October, 1880?
A. Yes, sir. I was master of her.
Q. At the time she had the collision?
A. Yes, sir.
Q. What were you in tow of at this time?
A. The Wolverton.
Q. What time of day was the collision?
A. About half past four, as near as I could judge; we left Brooklyn about four o'clock and it was about half past four.
Q. Whereabouts did the collision take place?
A. I should judge off what we call the Custom Gap, between South ferry and where the barge office is.
Q. Where had you started from?
A. From Roberts' stores, Brooklyn.
Q. In tow of what?
A. Of the Wolverton.
Q. Where were you bound for?
A. Long dock, Jersey City.
Q. Were you being towed by the Wolverton on a hawser or alongside?
A. Towed on a hawser.
Q. How long a hawser?
A. About fifteen fathoms.
Q. Do you mean by that fifteen fathoms altogether?
A. The line was only twenty-five fathoms altogether; it was a new line, three-and-a-half inch.
Q. And there were fifteen fathoms between you and the Wolverton?
A. I should judge so.
Q. Who was on board the barge?
A. The deck hand and myself.
Q. Where were you standing?
A. On the starboard side of the wheel and my mate was on the port side of the wheel.
Q. You both had hold of the wheel and were managing it?
A. Yes, sir.

Q. Was the Atlanta empty or loaded?

A. She was loaded with coffee and sugar.

19 Q. Whereabouts was your tow when you first saw the Packer?

A. I think she was two or three hundred feet from me when I first detected her.

Q. From you or from the Wolverton?

A. We were, I should judge.

By the COURT:

Q. You first noticed the Packer when you were two or three hundred feet from the Packer?

A. Yes, sir.

By Mr. BENEDICT:

Q. Whereabouts did she bear from you?

A. Two or three points off the port bow.

Q. Whereabouts was she heading?

A. I should judge for the East River, as far as I could place her.

Q. Heading towards you?

A. Yes, sir. She was trying to get inside the Wolverton—between the New York shore and the Wolverton.

Q. What was done on your boat when you saw there was going to be a collision?

A. I put my helm hard aport and lashed it aport, and run out and hailed the Packer and asked him to go back. Me and my mate hailed him.

Q. Did you notice whether he was going back or not?

A. No; the water was breaking onto the canal-boat's bow.

Q. Did you notice any change on the part of the Wolverton?

A. Yes; he ported his helm and went in shore and I followed him.

Cross-examined by Mr. MCCARTHY:

Q. And you place the point of collision where?

A. Off the Custom Gap—off the barge office.

Q. How far from that?

A. How far was she from it?

Q. How far off was the collision?

A. Two or three hundred yards; I couldn't be positive. I was all excited and just run and left the wheel, and I couldn't take the dimensions for all these figures.

Q. You said on your direct examination that it was about in the middle of the river.

A. Yes—that is, about two or three hundred yards off.

Q. That is what you mean when you say the middle of the river?

A. Yes, sir.

Q. Now, I want you to tell me as nearly as you can how far away the Wolverton was from the Packer when you first saw the Packer.

A. I think she was all of two hundred yards.

Q. When you first saw the Packer?

A. Yes, sir.

Q. And you were the length of the hawser still further off?

A. Yes, sir.

Q. Did you observe whether after that time the Wolverton made any change in her course?

A. I seen the Wolverton change—put her wheel to port—and as soon as she did I put my wheel to port.

Q. How long was that after you saw the Packer?

A. I suppose it couldn't be over two or three minutes.

Q. You said on your direct examination that the Packer was heading in?

A. She was.

Q. And trying to get between the Wolverton and the New York shore?

A. She was.

Q. Was that before or after the Wolverton changed her course?

A. The Wolverton changed her course and the Packer was trying to get inside of her.

20 By Mr. McCarthy:

Q. I wish to repeat a question that I put to you. How far do you say the Packer was from the New York shore at the time you first saw her?

A. Two or three hundred yards.

Q. And how far was the place of collision from the New York shore?

A. Two or three hundred yards, I reckon.

Q. Then the Packer had not made in any for the New York shore from the time when you first saw her?

A. Yes; she was making in when I first see her.

Q. Then the place of collision must have been nearer the New York shore somewhat?

A. Yes.

Q. Didn't you say it was two or three hundred yards?

A. Yes, sir.

Q. Are you very sure that the Packer did not stop and reverse before the collision?

A. That I couldn't answer you.

Q. Are you very sure that the Packer and her tow were not actually going backwards at the time of the collision?

A. They were coming ahead; I seen the water.

Q. Please answer my question.

Mr. Benedict: The witness has answered the question.

Q. All I ask you is this, and I want a direct answer and not an argument: Are you sure the Packer was not going back at the time of the collision?

A. That I couldn't tell you, but the water was breaking onto the bow of the canal-boat.

FINLEY FRASER, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. BENEDICT:

Q. Where do you live?
A. In Brooklyn.
Q. What is your business?
A. I am a seafaring man, at present employed in towing.
Q. Do you remember this collision between the barge Atlanta and the canal-boat in tow of the Packer?
A. Yes, sir.
Q. Were you on board the Wolverton at the time?
A. I was.
Q. What had you to do with her navigation?
A. I had nothing to do with the navigation at the time.
Q. Whereabouts were you?
A. I was in the pilot-house.
Q. Were you in the pilot-house from the time she started from Roberts' stores?
A. I was in the pilot-house from the time she left pier 10 till she went to Roberts' stores and took the Atlanta in tow.
Q. Did you stay there till the collision?
A. Yes, sir.
Q. When was the first that you saw the Packer and her tow?
A. The first thing that called my attention—I heard two whistles. I was reading a paper at the time and I looked up and I see
21 the Packer about two points on our port bow, heading into the East River.
Q. How was she heading with reference to the course of the Wolverton?
A. At the time I think she was heading right on towards the port bow of the Wolverton, as far as I can remember.
Q. So that when you looked at her what part of her did your eye strike?
A. I could see her port side; in fact, I could see the whole of her.
Q. Could you see both sides alike?
A. Pretty near; but more of the port side.
Q. And how far away was she from the Wolverton at that time, when you first saw her?
A. I don't suppose she was over three or four hundred feet. I was sitting reading a paper and the sound of the whistles drew my attention and I looked up and I saw her there.
Q. From the time when you first saw the Packer will you state what course she took?
A. She was heading up the East River.
Q. Did you see any change in her course?
A. When I stood up to look I see two men in her pilot-house putting her helm to starboard in order to cross the Wolverton's bow.

Q. Did you see whether that affected the direction of the boat herself—whether she swung any?

A. No, sir; I don't believe she did; she might; I don't think so.

Cross-examined by Mr. McCARTHY:

Q. How far was the Wolverton from the New York shore when you saw the Packer; in other words, how nigh had the Wolverton got to the New York shore when you saw the Packer?

A. About two hundred yards, about that.

Q. And you were heading for what pier on the New York shore?

A. Heading for the barge office then, so as to go around the Battery.

Q. You were heading for the barge office?

A. That is, heading outside of it.

Q. Which way did the Packer seem to be heading when you thus saw her?

A. Heading into the East River.

Q. She was heading up, then, was she?

A. Yes, sir; heading up, rounding the Battery.

By Mr. McCARTHY:

Q. Are you prepared to say that if you were on the starboard side of the Wolverton you could not have seen the Packer at any time before the collision?

A. If I was on the starboard side—what do you mean?

Q. Say on the starboard side of her house?

A. No, sir; I don't think I could.

22 Q. You have given testimony in a case involving some of the facts of this collision heretofore, have you not?

A. I gave testimony in Philadelphia.

Q. Before a commission?

A. Not on this case.

Q. Did you not testify when you first saw the Packer she was a quarter of a mile off?

A. I couldn't tell you the distance; I don't remember.

Q. Are you willing to say now she was not a quarter of a mile off when you first saw her?

A. I am not willing to say the distance at all; I give it as I gave it to you yesterday.

Q. Now answer my question. Did you not testify before the commissioner in Philadelphia that when you first saw the Packer she was a quarter of a mile off?

A. I am not prepared to say. It is a long time since, and I don't remember whether I gave that testimony or not. I might and I might not. You may read it if you choose and call my attention to it.

Q. (Reading from page 24:) "The tug Packer when I first saw her was off near the barge office about two points on our port bow and nearly a quarter of a mile off."

A. She might be; I don't know. I couldn't swear to it and I don't want to swear to it.

Q. Would your recollection on that occasion have been as good or better than it is now?

A. I suppose about the same. There may some things slip a man's memory; you are liable to that as well as anybody else.

CHARLES F. ADAMS, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. BENEDICT:

Q. What is your business?

A. Engineering.

Q. How long have you been an engineer?

A. Nine years.

Q. Were you engineer of the Wolverton at the time of this collision?

A. Yes, sir.

Q. You were in charge of the engine?

A. Yes, sir.

Q. What was the first you saw of the Packer?

A. The first I saw she was coming around the Battery.

Q. How did she bear with reference to your boat?

A. She was on our port bow, as far as I could make out of it.

Q. How far off?

A. When I seen her I suppose four or five hundred yards away from us.

Q. Did you hear any whistles at that time?

A. I heard our captain blow one whistle.

Q. How long after you first saw the Packer?

A. About three minutes, I suppose.

Q. Was that whistle answered?

A. I don't know whether it was answered or not; I didn't take any notice of that.

23 WALTER L. SCHULTZ, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. BENEDICT:

Q. What is your business?

A. Steamboat pilot.

Q. How long have you been a steamboat pilot?

A. About thirty years—somewheres in that neighborhood.

Q. You were pilot of the Wolverton at the time of this collision?

A. Yes, sir.

Q. Were you in the pilot-house in charge?

A. Yes, sir.

Q. How did you head across the river after you left Roberts' stores, after you took the barge in tow?

A. Partially across the river, heading out the river and a little across it—a very little.

Q. Do you remember whereabouts you were when you first saw the Packer?

A. Off pier 2, East River, in that neighborhood.

Q. How far out?

A. I suppose two or three hundred—about three or four hundred feet from the dock.

Q. When you saw the Packer how did she bear from you?

A. Bore ahead of our port bow.

Q. How far off?

A. I should think three or four hundred yards.

Q. Did you hear at any time any whistles from her?

A. Yes, sir; before the collision she blowed two whistles.

Q. How far away was she at the time when she blew the two whistles?

A. She was right on top of us.

Q. How far away, in your judgment?

A. About one hundred and fifty feet, probably.

Q. Had you seen any change in her course?

A. Not until she blowed her whistles.

Q. Then did you?

A. Yes, sir.

Q. What change did she make?

A. Starboarded her wheel, and tried to get across my bow.

Q. What did you do?

A. I put my wheel aport.

Q. Did you give them any whistle?

A. No; I hadn't time for a whistle.

Q. How much of a change in the course of the Packer did she make on the starboard wheel?

A. Four or five points.

Q. How much of a change did your port wheel make on your boat?

A. About the same.

24 Cross-examined by Mr. McCARTHY:

Q. How far away do you think the Packer was when you first saw her?

A. I don't know. I think probably about six or seven hundred yards, I should judge.

Q. When you testified in Philadelphia you said a quarter of a mile, didn't you?

A. Yes, sir.

Q. And you now say six or seven hundred yards?

A. In that neighborhood. I wouldn't be certain as to distance now, but I should think it was about that.

Q. She was then on your port bow?

A. Yes, sir.

Q. Whereabouts in the river was the Wolverton when you first saw the Packer?

A. I was between piers two and three, East River.

Q. On the New York side?

A. Yes, sir.

Q. What—the New York side?
A. Yes, sir; off New York; off pier two or three.
Q. How far off?
A. I should judge three or four or five hundred feet.
A. No more?
A. About five hundred feet.
Q. From piers two or three?
A. Yes, sir.
Q. And you then saw the Packer some seven hundred yards off. Is that it?
A. Yes, sir.
Q. And what were you then heading for?
A. I was making a turn for the Battery, going down gradually across the tide, probably heading for the Central railroad, New Jersey. That is about where we were heading.

By the COURT:

Q. Where do you say you were at the time?
A. About five hundred feet off pier two or three—in that neighborhood.

By Mr. MCCARTHY:

Q. You think about five hundred feet?
A. Yes, sir.
Q. Did you then observe when you saw the Packer what her course was?
A. Yes, sir.
Q. What was it?
A. She was headed directly in the river—straight up the river.
Q. Therefore you and she were not approaching each other head on before the collision?
A. No, sir.

By the COURT:

Q. By heading up the river you mean the East River?
A. Yes, sir; heading up in the East River.
Q. Now, give me to the best of your knowledge—and answer it in your own way so that you will be satisfied—what course you held after straightening out on that hawser.
A. I straightened up on that hawser along the Brooklyn shore and the barge went down by me and I turned around and came out to the East River, a little porting on New York, and heading for just below Communipaw dock—a straight line from Roberts' stores, clearing the Battery four or five hundred feet.
Q. As soon as you straightened on the hawser you headed for Communipaw dock?
A. No, sir; I did not say so.
Q. Well, I will go back and ask you the question again. After making fast the second time to the barge and straightening on your hawser what course did you take?

A. I had to take a turn half way round until I got on my course, then I straightened up.

Q. In other words, did you port or starboard your wheel?

A. Starboarded my wheel. We were directly along the Brooklyn docks when I straightened up and tautened my hawser, heading about northeast. I had to go up along the docks and turn around with a starboard wheel to get out in the East River.

Q. Why?

A. The position the barge was in when I took the hawser.

Q. Tell us what the position was.

A. I was heading up the Brooklyn docks and the ebb tide carried her stern down towards the Wall Street ferry and I let go and had to take hold again.

Q. How were you heading?

A. The same way she was up the East River.

Q. After this making fast to her did you haul her up the river?

A. She went up in the eddy tide some ways before we got her straightened down, probably as far as Harbeck's stores. We were both abreast of Harbeck's stores when I got straightened up. They are two or three piers above Roberts' stores. We went up in the eddy tide.

Q. What was it caused her to sag down towards Wall Street ferry?

A. The force I gave him pulling him out. I let go and slipped along by and got the hawser on the other end.

Q. Then you got up as far as Harbeck's stores before you straightened on the hawser?

A. Very near that. I was abreast of Harbeck's stores before I got her swung on the hawser.

Q. What was your course then?

A. Course was then four, five, or six hundred feet off pier 1. Just below Communipaw dock would be in a direct line from where we straightened out on the barge and where the collision occurred.

Q. That is, you could take a straight course after you straightened on your hawser and make right for Communipaw ferry?

A. A little below the ferry on the Jersey shore.

Q. And clear the Battery by how many feet?

A. Four or five hundred feet.

26 Q. How did that bring you as regards the tide—quartering on the tide?

A. Slightly; the ebb tide was carrying us down a little bit, about across the river—we came with the tide and across it partially, not much.

Q. What effect would the tide have on you, if any?

A. It would help us along, that is all.

Q. Would it sweep you down any?

A. Down the river; yes, sir; it wouldn't carry us to leeward but very little. I was going through the water all the while.

Q. What do you mean by "to leeward?"

A. Sag us off with the tide, but very little, not much.

Q. Then was your course down the middle of the river at any time or across?

A. Across and down, on an angle. The tide was running straight here (illustrating) and we were bound in that course with the tide and a little angling across.

Q. What course do you think you were holding by compass in order to reach this point, a little below Communipaw ferry?

A. I suppose heading about west northwest; about that, I should think.

Q. How does it happen that you got within three or four or five hundred feet of pier 2 if the course you were holding would have cleared the Battery by four or five hundred feet?

A. I don't understand the question.

Q. How does it happen that you got so near pier 2 as you have described, provided the course you were holding would carry you four or five hundred feet clear of the Battery?

A. If I said clear of the Battery I made a mistake. I didn't mean the Battery; it would carry us farther off from the Battery than that.

Q. How far off from the Battery?

A. Six hundred feet off the Battery. The Battery doesn't begin till we get off pier 1, and then it takes a short curve.

Q. Let us locate the new barge office. How far would you have cleared the new barge office on that course?

A. We would go a hundred and seventy-five feet farther off; we would be one hundred and seventy-five feet farther off from the barge office than from pier 2. The barge office pier is a shorter pier than pier 1, a good deal shorter.

Q. Where do you say pier 1 is—how far from the barge office?

A. It is to the eastward of the barge office. It separates Staten Island north-shore and Staten Island east-shore ferries.

Q. How far from the barge office is it?

A. Staten Island ferry slip and Governor's Island ferry slip is between that and the new barge office, which stands where the old barge office used to stand.

Q. How far is pier 1 from the new barge office?

A. I don't suppose over one hundred and fifty feet.

Q. Is it as much as that?

A. I don't know; I never paid any particular attention.

Q. How far do you call pier 2 from pier 1?

A. There is three ferry slips there. I don't know how far.

27 Q. How was your wheel from and after the time you straightened up on your hawser till the time you made the sheer? Were you on the port wheel or starboard wheel?

A. That depends on which way the boat sheered, either starboard or port. I kept a steady wheel, didn't need any particular steering.

Q. Didn't you endeavor to keep upstream a little to counteract the effect of the tide?

A. No, sir; the tide wasn't sending us out enough for that.

Q. You made or intended to make a straight course from Roberts' stores or near there to the point a little below Communipaw ferry?

A. Provided nothing got in the way or we run over nothing.

Q. At Wall Street ferry and Roberts' stores its tendency is straight down?

A. Yes, sir; slack water on the ebb.

Q. How far out does the slack water go onto the Brooklyn side?

A. On the half ebb it sets out maybe a hundred feet, more or less.

Redirect by Mr. BENEDICT:

Q. I understand you to say that your course with the barge was crossing the river towards the New York shore and drawing nearer the New York shore all the time. Is that so?

A. Yes, sir.

Q. Up to the time when you ported your wheel had there been any time that you had been going parallel with the line of the ends of the piers?

A. No, sir; no time.

Q. How had your course been bearing—onto the piers or off from them?

A. From Roberts' stores it was bearing rather onto pier 2, just four or five hundred feet off. From Roberts' stores we crossed the river northward and westward—or to the westward and northward—partially across the river. From Wall Street ferry we passed along by the piers all the way down, angling along.

Q. You understand I am speaking of the piers in the East River?

A. Yes, sir.

Q. What is the fact as to whether the barge Atlanta was sagged down below the course of your boat by the tide? Was she or was she not?

A. She was not. She followed directly after me. We were going with the tide and so little across it that the sag was not perceptible at all.

WILLIAM ACKERLEY, being duly sworn and examined as a witness for the libellants, testified:

By Mr. BENEDICT: What is your business?

A. Boating.

Q. How long have you been boating?

A. 14 years.

Q. Were you on the barge Atlanta at the time of this collision?

A. Yes, sir.

Q. Whereabouts were you on board?

A. At the wheel.

Q. On which side of the wheel?

A. On the port side.

Q. Whereabouts did you first see the Packer?

A. She was about in the neighborhood of 300 yards from us on the port bow.

Q. How much on your port bow?

A. I should judge three or four points probably.

Q. Did you notice previous to that time how the barge had been steering with reference to the tug Wolverton?

A. Directly after.
Q. Did you at any time see any change in the course of the Wolverton?
A. I didn't notice any.
Q. Did you notice her swinging either way?
A. No, sir.
Q. Do you remember anything being done with your wheel?
A. Yes, sir; it was hove hard aport.
Q. How soon was that after you saw the Packer?
A. I should judge in the neighborhood of two or three minutes.
Q. Do you remember what caused you to port your wheel?
A. Yes, sir.
Q. What was it?
A. On account to clear the Packer.
Q. Whereabouts did the canal-boat strike the barge?
A. 50 feet from the stem, I should judge.
Q. Aft of the pilot-house you were standing in?
A. Yes, sir.

Cross-examined by Mr. McCarthy:

Q. Will you please tell us just whereabouts in the river the collision occurred between your barge and the Cross Creek barge?
A. About, I should judge, 300 yards from off pier 1.
Q. Where do you say pier 1 is?
A. The lower side of the ferry.
Q. What ferry?
A. Hamilton ferry.
Q. Do you put pier 1 to the west—that is, towards Jersey, or towards Brooklyn from Hamilton ferry?
A. Towards Jersey—west.
Q. Then there is only one slip, is there, between pier 1 and the new barge office?
A. I am not certain whether there is one or two.
Q. It is a short distance?
A. Yes, sir.
Q. You think it was about 300 yards from there?
A. I should judge, yes, sir.
Q. Out into the stream?
A. Yes, sir.

Libellants rest.

Claimant's Testimony.

Steven Slover, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. McCarthy:

Q. Were you the pilot on the steam-tug E. A. Packer at the time of this collision between the Cross Creek barge and the Atlanta?
A. Yes, sir.

Q. Where were you at the time of the collision?
A. In the pilot-house.
Q. Who was with you in the pilot-house?
A. Deck-hand lookout.
Q. What was his name?
A. Shields.
Q. Who else was with you in the pilot-house, if anybody?
A. No one at the time.
—. ——
A. Kept close around the Battery, yes, sir.
Q. As you rounded the Battery how far, in your judgment, were you from, say, Castle Garden, or the bulkhead of Castle Garden?
A. I suppose we were two hundred yards off; something like that.
31 Q. Where were you when you first saw the Wolverton?
A. When we were right off the barge office I saw her.
Q. How far away from you was she when you saw her?
A. She was near the middle of the river.
Q. How far away?
A. I suppose seven hundred yards.
Q. From you?
A. Yes, sir.
Q. She was on a line between you and what point in Brooklyn?
A. About Wall-street stores I should say.
Q. How far off from the barge office were you?
A. A couple hundred yards—two hundred yards.
Q. You say that a line drawn from you to the Wolverton when you first saw her would touch Brooklyn about at the Wall-street stores?
A. Somewhere in that direction.
Q. What was your course when you thus saw the Wolverton—how were you heading?
A. Up the East River, or nearly so.
Q. Were you on a port or starboard wheel, or how was your wheel?
A. It was a little to port, just to keep the barge steady; the barge was on our port side.
Q. What do you mean by that—a little port, just to keep the barge steady? Please explain what you mean by that.
A. When you have a heavy loaded barge on the port side it requires some port wheel for to keep her steady.
Q. What will happen if you don't let the wheel port a little?
A. It is likely to go inshore with you, if you are near the shore on that side.
Q. What is that owing to?
A. The tide running.
Q. Why does it take you in that way?
A. The heavy barge on the port side; that is the reason.
Q. Wouldn't that be the case, wholly irrespective of the tide?
A. Yes; it is the case any time.
Q. What would be the effect of simply letting your wheel loose?

You say you kept it a little to port. What would have been the effect of letting your wheel easy?

A. The barge would run into the dock if you let go of it.

Q. It wouldn't be necessary, then, to starboard your wheel?

A. No, sir.

Q. On what side of the tug Packer was the Wolverton when you first saw her?

A. Starboard.

Q. Can you tell how many points?

A. No, sir; I cannot.

Q. How many points was she on your starboard bow?

A. I couldn't say.

Q. How long did it take you to stop your boat, going, as she then was, against the tide two miles an hour?

A. It did not take long; a very short time.

Q. Was it necessary for you to reverse?

A. Yes, sir.

Q. How many revolutions before she stopped?

A. I could not tell you that.

32 JAMES E. PURNELL, being duly sworn and examined as a witness for the claimant, testifies:

By Mr. McCARTHY:

Q. How old are you?

A. Twenty-three years old next October.

Q. You belong to the Cross Creek barge No. 4?

A. No. 1.

Q. Your father was master of her?

A. He was master at that time of No. 5.

Q. At the time of this collision what barge were you on?

A. No. 5, Cross Creek.

Q. Was that the barge in tow of the Packer?

A. Yes, sir.

Q. Where were you at the time you left pier 9?

A. I was standing on the barge's deck till we got around to about going around the Battery at pier 1.

Q. How near, if you observed to state, did you keep to the New York piers coming down the North River?

A. About two or three hundred feet—300 feet.

Q. As you rounded the Battery how far was your tug and tow from Castle Garden, to the best of your knowledge?

A. She was about 500 feet off there.

Q. And how far off was she from the end of the new barge office?

A. I don't know about how far she was off there.

Q. Give it as nearly as you can.

A. About 400 feet, I suppose.

Q. How far away was the Wolverton when you saw her?

A. I don't know about how far. I should think about 800 yards.

Q. And where was she?

A. She was then heading across to the East River.

Q. Whereabouts in the river?
A. She was about in the middle of the river.
Q. On which bow of the Packer was she?
A. On the Packer's starboard bow.
Q. What part of the Wolverton did you see? Did you see both her starboard and port bow or did you see only one?
A. I see both sides.
Q. She was heading in such a way that you saw both bows?
A. Yes, sir.
Q. Are you sure of that?
A. Yes, sir; I am sure.
Q. Did you see whether there was anything attached to her or hanging onto her?
A. Yes, sir; a barge.
Q. Whereabouts do you say the collision took place—abreast of what point?
A. I should think about pier 2—right abreast that, as near as I can remember.
Q. How far out in the river do you think the collision took place?
A. About 300 feet.

33 JAMES S. PURNELL, being duly sworn and examined as a witness, testifies:

By Mr. McCARTHY:

Q. How old are you?
A. Going on 53.
Q. What is your occupation?
A. Captain of a barge.
Q. You follow the water?
A. Yes, sir.
Q. How long have you followed the water?
A. All my life; as far as I can remember.
Q. Were you master of the Cross Creek barge at the time of this collision?
A. Yes, sir.
Q. Were you on her at the time of the collision?
A. Yes, sir.
Q. Whereabouts on her were you when you were rounding the Battery coming down from pier 9?
A. I was in the cabin till just before we rounded the Battery.
Q. Did you see the Wolverton before the collision?
A. Yes, sir.
Q. Which way did you have to look to see her?
A. How I came to see her they blowed two whistles to go on the port side of her.
Q. Do you know what the blowing of two whistles means?
A. To go on the left-hand side of her.
Q. Left-hand side of what?
A. Left-hand side of the Wolverton.

Q. You heard two whistles blown?
A. Yes, sir.
Q. What next did you see?
A. I came out to see what was the matter, with my child in my arms.
Q. Did you see the Wolverton?
A. Yes, sir.
Q. Which way did you look to see her?
A. Across the bow of the Packer.
Q. That would be to the right, left, or straight ahead?
A. It would be to the right.
Q. What part of the Wolverton did you see? Did you see her right-hand side or left, or did you see her full on—bows on?
A. I seen her right-hand side.

Cross-examined by Mr. BENEDICT:

Q. You were examined once as a witness in reference to this matter in Philadelphia?
A. Yes, sir.
Q. Do you remember being asked at that time how far you were from the Battery at the time of the collision?
A. Yes, sir.
Q. Do you remember saying, in answer, that you were a little above the Battery and about 350 feet away?
A. Yes, sir.
Q. Was that your judgment then?
A. That was my judgment; yes, sir.

34 STEVEN SLOVER further examined.

Cross-examined by Mr. BENEDICT:

Q. You have been examined about this matter before, haven't you?
A. Yes, sir.
Q. And gave your testimony on the case which was tried in Philadelphia?
A. Yes, sir.
Q. And before that examination you had talked the matter over with Mr. McCarthy, had you not?
A. I don't know as I did.
Q. You had told him the facts as nearly as you could?
A. Yes, sir.
Q. And you meant to tell the facts very accurately, did you?
A. As near as I could get at it, yes, sir.
Q. And when you were examined before as a witness you meant to tell the story just as well as you knew?
A. Yes, sir.
Q. And when you were examined here in court two or three days ago you meant to tell the facts just as you understood them, did you?
A. Yes, sir.

Q. And now, haven't you, on every time before this, said that when you saw the Wolverton she bore on your starboard bow?
A. On our starboard quarter; yes, sir.
Q. Starboard quarter?
A. Starboard bow; yes, sir.
Q. You know the difference between the bow and the quarter, don't you?
A. Yes.
A. You have said every time, haven't you, that she was on your starboard bow?
A. Yes, sir.
Q. Do you mean to change that now?
A. No, sir.

By Mr. BENEDICT:

Q. When you were examined in the Philadelphia suit were you not asked (page 61 of printed testimony) "How did the Wolverton have you?" and did you not answer, "She was on my starboard bow?"
A. Yes, sir.
Q. Were you not asked this question: "How were you as to her; did she have you on her starboard bow or on her port bow?" and did you not say, "She had me on her port bow; she was on my starboard bow?"
A. I don't think I did; I might have stated so.
35 Q. How many boats had the Packer brought from Port Johnson?
A. Two, I think.
Q. Only two?
A. I think it was two; yes, sir.
Q. Were you not examined in reference to that in the other case and did you not say it was three?
A. I might have said more; I don't remember now how many she did have.
Q. Had you gone to any other pier except pier 9?
A. No, sir.
Q. Don't you remember how many you left there?
A. I think we left one there.
Q. Do you remember where you had the other boat coming up from Port Johnson—on which side of you?
A. I had her on our port side, I think. I don't remember changing her.
Q. That is the same side as the Cross Creek boat?
A. We had the pier 9 boat on the starboard side and the Cross Creek No. 5 on our port side.
Q. Didn't you have any barge on the other side?
A. I don't think we did.
Q. Where did you meet the ebb tide?
A. The East River tide?
Q. The ebb tide?
A. Coming down North River.

Q. Whereabouts did you meet it—before you got to Governor's Island?
A. Yes, sir.
Q. Did you have any difficulty in towing this barge against the ebb tide?
A. Not much.
Q. You went right along just as you always do?
A. Not very fast, but went along.
Q. As you always do?
A. Yes, sir.
Q. You had no difficulty in managing them, had you?
A. No, sir.

By the COURT:

Q. You had three then?
A. I think it was two we had.

By Mr. BENEDICT:

Q. Did you have charge of the wheel coming up from Port Johnson to pier 9?
A. Most of the way; yes, sir.
Q. How long would it take you against the ebb tide to stop your boat with that tow?
A. A very short distance.
Q. Do you mean to say that you were in the ebb tide or in the eddy?
A. We wasn't in the eddy tide.
Q. The eddy tide was setting the way you were going, was it not?
A. No, sir; not altogether.
Q. How then?
A. The tide was slacker in there than it was out in the middle of the river.
36 Q. Is that what you mean by an eddy tide?
A. Yes, sir.

By the COURT:

Q. You don't mean a back eddy—back water?
A. No, there was no back water; the tide was slack along shore.

By Mr. BENEDICT:

Q. The tide was an ebb tide against you?
A. The tide was slack water.
Q. But the tide was against you, was it not?
A. There wasn't much, anyhow.
Q. What there was, which way did it go?
A. (No answer.)

By the COURT:

Q. Do you speak of the actual time of the collision?
A. Yes, sir; there wasn't any tide of any account where I was.
Q. When; at the time of the collision or before it?

A. At the time and just before it.

By Mr. BENEDICT:

Q. At what point in the navigation was it that you had an ebb tide against you?
A. Before we got in the slack water.
Q. How far had you run in the slack water before the collision?
A. Not very far.
Q. How far; over a length?
A. Yes, sir; I guess so.
Q. A length?
A. Yes, more than a length.
Q. In the slack water more than a length?
A. Yes.

By Mr. BENEDICT:

Q. Do you know what the rules are with reference to steamboats that are meeting head and head, as to how they shall pass each other?
A. I think I do.
Q. Tell me what is the rule.

(Objected to on the ground that no foundation has been laid.)
(Objection overruled.)

A. Haven't you got them here?
Q. What is the rule when two vessels are meeting head and head—the pilot rule is what I mean?
A. I cannot answer that.
Q. You do not know what the pilot rules require in that position?
A. Yes, sir.
Q. What do they require?
(No answer.)

By the COURT:

Q. Do you understand the question?
A. No, sir; I do not.
Q. He meant to ask you, in case two steamers are approaching each other near head on, if you know what the pilot rule is in respect to blowing whistles and taking a course?
37
A. No, sir; I do not.
Q. Do you know what the usual rule of navigation in such a case is—that is, two steam-vessels approaching each other so as to be head on or nearly head on?
A. I understand you.
Q. Do you remember how the rule requires you to go, or isn't there any rule about it?
A. Yes; there is a rule, but I don't remember what it is.

By Mr. BENEDICT:

Q. Don't you know what the law requires you to do in a case like that?
A. No, sir.

Q. Do you know what is required of two steamboats which are meeting so that they are end on or nearly so?
A. No, sir.
Q. Have you got a license now as pilot?
A. Yes, sir.

Redirect by Mr. McCarthy:

Q. Suppose you are meeting a steamer and you are on a steamer and you want to go to the right, what would you do with your whistles?
A. I would give the one whistle.
Q. Now, suppose you wanted to go to the left, what would you do?
A. I would give him two whistles.
Q. So that when you are meeting head and head what do you generally do—go to the right or to the left?
A. Depends on circumstances.
Q. Take ordinary circumstances?
A. Generally go to the right.
Q. And you generally then blow how many whistles?
A. One whistle.
Q. When, however, in exceptional circumstances, you want to go to the left, how many whistles do you blow?
A. Two.
Q. Well, you know then, don't you?
A. Yes, sir.
Q. That is what is called the steamboat inspector's rule, isn't it?
A. Yes, sir.
Q. You say that you saw the Wolverton on your starboard bow?
A. Yes, sir.
Q. Now, I want — know what you understand to have been the requirement of the law with reference to what you would do with the boat in that position?

(Objected to. Question withdrawn.)

Q. (Showing witness a sheet of paper marked with outlines of two vessels.) Suppose two steam-vessels are in those positions and they are at such distance that risk of collision is involved, what do you understand is the requirement of the law of pilots on those two steamboats?
A. That all depends on circumstances.

38 By the Court:

Q. Leaving out all special circumstances, suppose you have got plenty of room and there is nothing to prevent either vessel going as she pleases; that they are steamers, and that they are so near each other as to involve a risk of collision. Now can you tell what is required by law of either vessel?
A. I don't know anything about the law.
Q. Take it in this way: If there is danger of collision with the vessels going as I have described, will you state what you understand to be the duty of each vessel?

A. If there is danger of collision?

Q. Yes; in the relative positions shown on that diagram, suppose there is danger of collision, what should each vessel do there?

A. This one here marked A on the diagram should blow one whistle and go on the other's starboard quarter to the right.

Q. What has B got to do?

A. He has got to try and get out of the way.

(Diagram is hereto annexed.)

(Here follows diagram marked page 38.)

RICHARD FIRMAN, being duly sworn and examined as a witness for the claimants, testifies:

By Mr. MCCARTHY:

Q. Where do you reside?

A. South Amboy.

Q. What is your occupation?

A. Engineer.

Q. Were you aboard the Packer at the time of this collision between the barge Atlanta and Cross Creek barge No. 5?

A. Yes, sir.

Q. Where were you?

A. In the engine-room.

Q. Were you a witness of the collision?

A. Yes, sir; I saw it; I didn't see the collision, but I saw it before.

Q. Saw what led up to it?

A. Yes, sir.

39 Q. Where did you first see the Wolverton?

A. When I heard him blow the whistles.

Q. When the man blew the first whistles?

A. I don't know. I only heard him blow two. I think it was the last, and I looked to see what was coming.

Q. What side of your boat did you look from?

A. The starboard side.

Q. Whereabouts on your starboard side?

A. The starboard engine-room door.

Q. How far is that from the bow?

A. I don't know; about amidships.

Q. You saw, then, by looking out of your starboard engine-room door the Wolverton coming?

A. Yes, sir.

Q. How far off did she seem to be?

A. I should say 300 or 350 yards.

Q. How in the river?

A. She was pretty well out—out towards the middle from what we were.

Q. What side of your boat was she on?

A. On the starboard side. She couldn't be on any other side.

Q. You know she was on the starboard side?
A. Yes, sir; else I couldn't see her.
Q. When you saw the barge did you look right over the Wolverton to see the barge?
A. No, sir; I see the barge astern of her.
Q. You looked to the stern of the Wolverton in order to see the barge?
A. Yes, sir; I looked at the stern. I didn't see her at the bow.
Q. You looked to the right of the Wolverton to see the barge?
A. Yes, sir; under her stern—to the right. I couldn't see her on the starboard side. I could see her off the Wolverton's port side behind the Wolverton.

Mr. WYLLYS BENEDICT:

Q. You looked on your right-hand side to see her?
A. Yes, sir. I couldn't see her on any other side, the way she was coming.
Q. Did you see the whole of the barge?
A. No, sir; I couldn't see both sides of her.
Q. I mean to say was any part of her obscured by the tug that was towing her?
A. I don't think there was. I don't know.

By Mr. BENEDICT:

Q. Could you see the whole of her port side?
A. I could see her stern.
Q. You say you think she was then three hundred or three hundred and fifty yards off?
A. Yes, sir.
Q. You don't want to change that estimate of distance?
A. No. I think that is about the distance.

40 JAMES SHIELDS, being duly sworn and examined as a witness for the claimants, testifies:

By Mr. MCCARTHY:

Q. You were on the Packer at the time of the collision?
A. Yes, sir.
Q. And what was your duty on the Packer?
A. Deck hand.
Q. Did you observe how your barge and tug went as you went around the Battery?
A. Yes, sir.
Q. Did you see the Wolverton before the collision?
A. Yes, sir.
Q. How far off was she when you saw her?
A. About four or five hundred yards.
Q. Where were — when you saw her?
A. Opposite the barge office.
Q. Where were you standing?
A. I was up in the pilot-house.

Q. How long have you been steamboating?

A. Seventeen years. I am a licensed pilot now and have been for nine years. I am also a licensed master as well as pilot. I have been in all kinds of towing employ, including lighterage. I have been in Twombley's employ—"Vanderbilt's" as they call it—and I have been in passenger business and in all kinds.

Q. You have been in the habit of towing around the point of the Battery?

A. Yes, sir.

Q. With both kinds of tide?

A. Yes, sir.

Q. Going around from the East River into the North River with the ebb tide, have you frequently met tows coming from the North River into the East River?

A. Yes, sir.

Q. Is there any universal or customary rule as to which side they go?

A. No, sir; I never have learned of any.

Q. How then do they actually go?

A. They go the best way they can.

Q. Do they actually go on one side or on the other, or do they go both sides?

A. They go both sides; go any side.

By the COURT:

Q. Both sides of what?

A. Of the boat coming.

Q. The boats go either side of each other?

A. Yes, sir.

By Mr. BENEDICT:

Q. What is your experience as to which can sheer the easier—a vessel that is going down with the ebb tide or a vessel that is going against it?

A. You can handle a boat easier going against the tide.

EDWARD SIMMS, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. BENEDICT:

Q. What is your business?

A. Steamboating. I am a licensed pilot and captain. I have been captain about five years and I have been in the tug-boat business about eleven years. I am twenty-six years old.

Q. Have you towed around the Battery oftentimes?

A. Yes, sir.

43 Q. What kind of vessels have you towed around?

A. All kinds.

Q. Have you towed vessels down into the East River from the North River on the ebb tide?

A. Yes, sir.

Q. At the strength of the ebb tide have you met other tows coming from the North River into the East River?

A. I have.

Q. Is there any rule as to which side of vessels going into the East River they go?

A. No, sir.

Q. Some go one side and some the other?

A. Go either way a man can get through the best.

Q. All depends upon the circumstances and position of one boat with reference to the other?

A. That is it exactly.

GEORGE GAVIN, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. BENEDICT:

Q. What is your business?

A. Steamboat captain.

Q. How long has that been your business?

A. Since I was 17 years old I have been steamboating. I am 38 years old the 10th of next July. I have been captain very nigh four years. I am familiar with towing around the harbor on all kinds of tide.

Q. In towing from the East River into the North River on the ebb tide have you frequently met tows coming from the North River into the East River?

A. Yes, sir.

Q. Is there any rule or universal custom as to which side they go?

A. No, sir; not to my knowledge. I never heard of any.

Q. Some go one side and some the other?

A. Yes, sir.

Q. All depends on how they are approaching?

A. Yes, sir.

Q. And what do you say as to which vessel would have the right of way in that case, the vessel going with the tide or the vessel going against it?

A. The vessel going with the tide has the right of way.

Testimony closed.

Map or diagram "Ex. A," Dec. 4, '87, is admitted in evidence.

44 *Supplement to Apostles.*

The following extracts of testimony were put in evidence on the part of the libellant:

District Court of the United States for the Eastern District of Pennsylvania.

PURNELL, Master of the "Cross Creek Barge No. 5,"
vs.
STEAM-TUG "DR. WOLVERTON." } In Admiralty.

PHILADELPHIA, *March 30th*, 1881.

Present: Messrs. Coulston and McCarthy.

45 JAMES S. PURNELL sworn and examined.

By Mr. MCCARTHY:

* * * * * * *

Q. How far from the Battery, to your best knowledge and recollection, (were you) at the time of the collision?
A. We were a little above the Battery.
Q. How far away from the shore of the Battery?
A. About three hundred and fifty feet.
Q. Is that guess-work?
A. That is as near as I can come at it.

Libellant's Testimony, p. 6.
Cf. Apostles, p. 127 *et seq.*

* * * * * * *

Q. How far away do you think the Wolverton was then (when you heard two whistles from the Packer)?
A. The Wolverton was about three hundred and fifty feet off us.

Libellant's Testimony, p. 10.

By Mr. COULSTON:

* * * * * * *

Q. When the Packer blew the whistles how far off was she from the Wolverton?
A. About three hundred and fifty feet.

Libellant's Testimony, p. 15.

ELI A. KELLAM sworn and examined.

By Mr. MCCARTHY:

* * * * * * *

46 Q. How large a tow had she (the E. A. Packer) brought up that noon?
A. She had brought three, I think.
Q. Three of what?
A. Cross creeks.
Q. Each one being what, compared to this one?
A. I think the other two were smaller.
Q. What tonnage have you yourself known the E. A. Packer to carry or haul against strong ebb tide?

A. We have taken tows from South Amboy to New York of over four thousand tons with the E. A. Packer.

Q. What tide?

A. We have to stem the tide in the Kills and have to stem the first of the ebb tide in New York Bay.

Libellant's Testimony, pp. 34, 35.
Cf. Apostles, p. 175.

* * * * * * *

Q. Whereabouts, as respects the New York shore, did this collision occur—off what pier?

A. Right off the South ferry.

Q. How far from the shore?

A. I couldn't tell you exactly how far. I suppose from one hundred and fifty to two hundred yards; it might have been further.

Q. You think it was from four hundred and fifty to six hundred feet from the New York shore?

A. Yes, sir.

Q. Do you mean by that the shore line or the ends of the piers?

A. I mean from the ends of the piers.

Libellant's Testimony, p. 40.
Cf. Apostles, p. 178.

* * * * * * *

47 STEVEN SLOVER sworn and examined.

By Mr. MCCARTHY:

* * * * * * *

Q. How did the Wolverton have you (when you first saw her)?

A. She was on my starboard bow.

Q. How were you as to her; did she have you on her starboard or on her port bow?

A. She had me on her port bow; she was on my starboard bow.

Q. Will you take a piece of paper and make a little diagram of their positions?

The WITNESS: I will try.

Witness makes a diagram, saying: "I can't give you much of a diagram."

(Diagram marked "Exhibit 3, March 30, 1881.")

Q. That diagram illustrates, according to your judgment, the relative positions, similarly the way they were heading?

A. Something like that; yes, sir.

Q. Do you mean to say that it is at all accurate in regard to distances?

A. No, sir.

Libellant's Testimony, pp. 61, 62.
Cf. Apostles, pp. 135, 141 *et seq.*

* * * * * * *

RICHARD FURMAN sworn and examined.

By Mr. McCARTHY:

* * * * * * *

48 Q. What first attracted your attention to the matter?

A. I heard two whistles blowing and I looked out to see what was coming.

Q. Did you go out of the engine-room?

A. No, sir.

Q. You looked out?

A. I looked out.

Q. How far were you from the New York shore when you heard these whistles blowing?

A. About two hundred yards, I judge, or two hundred and fifty.

Libellant's Testimony, pp. 72, 73.
C'f Apostles, p. 158.

* * * * * * *

Q. Whereabouts was she (the Wolverton) in the river (when you saw her)?

A. She must have been somewhere near the middle of the river.

Q. On which bow of the tug was she?

A. The starboard bow?

Q. Which way did she seem to be heading?

A. Heading across—very near pier 1, East River.

Libellant's Testimony, p. 74.

49 U. S. Circuit Court, Southern District of New York.

NEW JERSEY LIGHTERAGE CO. }
vs.
STEAM-TUG E. A. PACKER, &c. }

SIR: Please take notice that Benjamin P. Hansell and Thomas L Morris will be examined as witnesses for the appellants in the above cause, on the twenty-fourth day of February, 1885, at one o'clock p. m., before Edward L. Owen, Esq., United States commissioner, at his office, No. 16 Exchange Place (Post building), New York, and you are notified to attend if you shall see fit.

Dated February 18th, 1885.

Yours, &c., BENEDICT, TAFT & BENEDICT,
Appellants' Proctors.

To E. D. McCarthy, Esq., appellee's proctor.

50 *Examination of Benjamin P. Hansell, Taken Pursuant to Notice, as a Witness for Libellant.*

Present: Proctors for both parties.

The witness, having been first duly sworn, testifies:

I have been engaged in the towing business thirty-eight years about—I mean, have had charge of steam-towing vessels that number of years. I have been towing in and about the harbor of New York all that time.

During that time it has been my business to tow vessels from the East River to the North River and from the North River to the East River for the past 21 years constantly. I have towed at all times and all tides day and night; have towed vessels alongside and on hawsers, and I am pretty well acquainted with the navigation around the Battery.

Q. In towing vessels from the North River into the East River when there is a strong ebb tide in the East River, and if you are meeting vessels coming from the East River to the North River, do you always go on the same side of them?

A. No, sir.

51 Q. What determines which side of those vessels you pass them?

A. That depends upon the circumstances of each case when we meet vessels. Sometimes pass on one side and sometimes on the other.

Q. Do you know the line which the ebb tide takes from the end of the East River piers?

A. No. I don't think I can answer that.

Q. Is not the line of the strength of the ebb tide clearly defined from the ferry slips westward?

A. Yes, sir; the line between the ebb tide and the slack water.

Q. How far out from the barge office is the edge of the ebb tide when the tide is strong?

A. It is four hundred feet at least; it might be more.

Q. Assume that a tug was coming from the North River having a barge with three hundred and twenty-five or three hundred and seventy-five tons of coal alongside on the port side; that she was coming at a rate of speed which when going against the strength of the ebb tide in the East River would carry her not faster than two miles an hour; assume that she came around the Battery at a distance of three or four hundred feet from the Battery, with her helm a little aport, enough to keep the barge steady. When she reached the line of the ebb tide with her helm in that way what would be the effect of the ebb tide upon her?

A. If she strikes into the tide with the tide on that port bow the tide would sweep her away, carry her down before she could recover herself. She would lose something.

Q. How far, in your experience, do you say she would go out into the ebb tide before she could get headed directly against it?

A. I should judge the full length of the vessel herself. Of
52 course, I understand in the case like that that she strikes the tide so that the force of the tide strikes her on the port bow as she comes out of the slack water.

THOMAS L. MORRIS, being duly sworn, deposes and says:

I live in Jersey City. I am a captain and pilot of tug-boats; have been in that business 23 years in the harbor of New York. I have been in the habit of towing vessels from the North
53 River and from the East River around the Battery, all kinds of vessels and at all times of the tides; every day, for that matter, except Sundays. I was eleven years and a half in the employ of Shortland & Co.

Q. When the tide is at the strength of the ebb in the East River how far off abreast of the barge office is the line between the ebb tide and the eddy, there being no wind to speak of?

A. Well, from 300 to 350 feet, I should judge.

Q. How do the vessels coming out of the North River into the East River—steam-vessels—and vessels coming from the East River into the North River pass each other in the neighborhood of the barge office—that is, vessels towing other steam-vessels?

A. I follow the Battery around from the East to the North River, from the North to the East follow the North River tide around until I open the piers by the barge office, and then edge into the eddy.

Q. This you speak of what you do youself and what you have seen other vessels do?

A. Yes, sir.

Q. And is there any universal rule as to which side of each other they pass?

A. No; none as I know of.

Q. Upon what does it depend upon which side they pass?

A. It depends upon which way you are going. The tide has something to do with it. If you are going from the East to the North it is customary to pass close in, passing the other on my port hand.

Q. Suppose that a tug was coming around from the North River into the East River, having a barge with 375 tons of coal aboard, alongside on the port side of the tug; that she was coming at a rate of speed which, when going against the strength of the ebb tide in the East River, would carry her not faster than two miles
54 an hour; suppose that she came around the Battery at a distance of 300 or 400 feet off with her helm a little aport—enough to keep the barge steady. Under those circumstances, when she reached the line of the ebb tide with her helm that way, what would be the effect of the strength of the ebb tide upon her?

A. Be apt to carry her off a little—her helm aport.

Q. How much would she be carried off before she could straighten herself up so as to head against the ebb tide?

A. Well, that is a pretty hard question to answer. It would depend upon what kind of a boat you would have. A small tug she would go farther.

Q. Do you know the tug E. A. Packer?
A. Yes, sir.
Q. How far do you say the E. A. Packer would be carried off under those circumstances?

(Objected to.)

A. She might go, I should judge, from 75 to 100 feet before she straightened up again.
Q. Supposing the E. A. Packer, with such a barge, had come round the Battery in that way—had come into the ebb tide in that way—and had got straightened up against the ebb tide, could any one tell from her position or heading whether she had come round from the North River or come directly over from Bedloe's Island?
A. No, sir.

Cross-examination:

I am now in command of the tug B. M. Freligh.
Q. Suppose you are going around the Battery from the North into the East River when the tide is running out of the East
55 River strong and full, and you have a heavy tow lashed to your port side, how near the barge office would you go in making the turn?
A. I should judge in the neighborhood of 300 feet, and such is the almost invariable custom, I should say.
Q. In the same circumstances, how far would you go from the end of pier No. 1?
A. About 200 feet—I should try to keep in the eddy.
Q. Suppose when 300 feet off the barge office, in just such circumstances, you see another tug 700 feet away coming down from Roberts' stores, on the full tide, and pointing for about Communipaw ferry, so that she—this other tug—would, if she kept on her course, pass the barge office 700 feet off, what would you do?

(Objected to.)

A. It would be a time when something would have to be done very quick. I should blow my whistle. If I was on the boat that was going up into the East River I should keep my course.
Q. Would you go inside or outside?
A. That would depend upon what signal was blown.
Q. What signal would you give?
A. Well, it would depend upon the signal the other man gave.
Q. Suppose the other man gave no signal at all?
A. I should blow two whistles.
Q. What would that mean?
A. That I would pass to my left—in other words, I would keep inside.

56 (The foregoing testimony is objected to by the counsel for the claimant, because it was taken on so late an occasion and because it was accumulative.)

WALTER L. SCHULTZ, being duly sworn, deposes and says:

I was examined on the trial in this case in the district court.

Q. Was there any other tug in the river at the time of this collision anywhere between the Packer and Governor's Island?

A. There was none to bother the movements of the Packer or the Wolverton.

Q. Was there any other tug in the direction of Bedloe's Island that you could have mistaken for the Packer at any time?

(Objected to as leading; also that the witness has testified to the subject before.)

A. No; there was none.

Q. When you first noticed the Packer was she in the ebb tide or in the eddy?

(Objected to, because the witness has already sworn to that point.)

A. She was in the edge of the eddy—between the true tide and the eddy.

Q. And how was she heading with reference to the tide?

A. Right up against the tide.

Q. Do you know of any prevailing custom in navigation around the Battery, where a tug and tow coming from the North River and another tug and tow is coming from the East River, as to which side of each other they shall pass?

57 A. A vessel going with the tide has the right of way. A vessel going against the tide gives way—always passes to the right without a whistle—without something is in the way.

Q. How much sooner would it have been necessary for the Packer to have given you a signal of two whistles for that signal to have been in time to enable you to have passed under her stern?

A. Well, probably two minutes.

Cross-examined by Mr. MCCARTHY:

Q. You are the Mr. Schultz that testified in the district court?

A. I am.

WALTER L. SCHULTZ.

Subscribed and sworn to before me March 17th, 1885.

EDWARD L. OWEN,
U. S. Commissioner.

58 [Endorsed:] U. S. circuit court, southern district of New York. The N. J. Lighterage Co., libellant and appellant, *vs.* The Steam-Tug "E. A. Packer," her engine, &c., John Scully, claimant and appellee. Testimony taken in the circuit court on behalf of appellant. Benedict, Taft & Benedict, appellant's proctors, 64 Wall St., N. Y. E. D. McCarthy, appellee's proctor, 50 Wall St., N. Y.

59 The counsel for the claimant thereupon proposed the following findings of fact and conclusions of law to be found by the court:

60 U. S. Circuit Court, Southern District of New York.

THE NEW JERSEY LIGHTERAGE COMPANY, Appellant,
vs.
THE STEAM-TUG "E. A. PACKER," &c., Appellee.

Proposed Findings of Fact on the Part of the Respondent.

First.

This collision occurred off pier 1, Battery, in the middle of the afternoon of October 25th, 1880.

At the time of the collision the tide was running strong ebb out of the East River.

Second.

The steam-tug "Packer," having a heavy tow lashed to her port side, was, prior to the collision, slowly steaming around the
61 Battery and heading up into the East River on a compass course of about east by north or east northeast. She steamed around the Battery and passed the new barge office, about 300 feet away, it being her intention to keep well in the slack water of the ebb tide while getting into the East River. Her course was heading up into the East River more and more as she went along. Her speed past the land was not more than two miles per hour.

Third.

The steam-tug "Wolverton" was at or about the same time crossing the mouth of the East River from a point at or near Roberts' stores, Brooklyn. She was hauling on a hawser the barge "Atlanta," owned by the libellant, and the length of the hawser between the tug and tow was not less than 150 feet. From the stem of the tug "Wolverton" to the stern of the barge "Atlanta" was a distance of at least 300 feet.

After leaving Roberts' stores, Brooklyn, the course of the tug "Wolverton" was about west by north, and if held unchanged would have brought up at a point below Communipaw dock, Jersey City, and would have cleared the new barge office and the Battery 600 or 700 feet. The "Wolverton," with the assistance of the tide, was making seven to eight miles an hour.

Fourth.

As the tugs approached each other each had the other on her own starboard bow. Their courses were nearly parallel and such that they would have cleared each other by 200 feet or more if the "Wolverton" had held her course unchanged.

62 The "Wolverton" was observed by the "Packer" when at a distance of 500 yards or more. She, the "Packer," then blew two blasts of her whistle, which signified that she would keep inside. The "Wolverton" made no reply whatever to this signal.

The "Wolverton" kept on her course with undiminished speed until she was about 200 feet from the "Packer," when she suddenly

ported her wheel and took a rank sheer of four or five points to the right, bringing herself and her tow directly across the "Packer's" bow. This manœuver was the proximate cause of the collision which followed. The "Wolverton" herself, because of her high speed, escaped both the "Packer" and her tow, but the barge "Atlanta," being so far behind the "Wolverton," was unable to do so. A collision followed between the port side of the barge "Atlanta" and the bow of the "Packer's" tow.

As a conclusion of law I find that the tug "Wolverton" was wholly in fault, and that this libel was properly dismissed in the court below.

63 U. S. Circuit Court, Southern District of New York.

THE NEW JERSEY LIGHTERAGE COMPANY, Libellant,
vs.
THE STEAM-TUG "E. A. PACKER," HER ENGINES, &c., JOHN SCULLY, Claimant.

Proposed Additional Findings of Fact Submitted by the Claimant.

First. From and after the moment when the two tugs saw each other the course of the Wolverton up till the instant when she ported her wheel was a straight line from Roberts' stores, Brooklyn, to a point just below Communipaw dock, New Jersey, being about in the middle of the river, when opposite pier 6, New York, and clearing piers 2 and 1 by five hundred (500) or six hundred (600) feet and clearing the barge office on the Battery by one hundred and seventy-five (175) feet more. Her course by compass was west by north (see folios 324 to 340 and fol. 368).

Second. The tugs Wolverton and Packer were at no time approaching, each having the other on her own port bow (fol. 382).

Third. Up to the time when the Wolverton ported her
64 wheel she had not been at any time going parallel with the line of the ends of the New York piers. From Roberts' stores she bore on to pier two, crossing the river to the westward and northward, going so nearly with the tide and so little across it that there was no perceptible sag to her hawser barge (fols. 386–388).

Fourth. The half ebb tide of the East River sweeps straight down towards Buttermilk channel until it gets abreast of South ferry, and then it strikes Governor's Island (fol. 383).

Fifth. When the tug Wolverton saw the tug Packer she (the tug Packer) was headed straight up the East River and the two tugs were not then approaching each other head on (fol. 312).

Sixth. The porting of the Wolverton's wheel when she was about 200 feet from the Packer was a change of four or five points from her course (fol. 295).

Seventh. The place of collision was about 200 feet off from the South Ferry pier (fol. 344).

Eighth. The whistles that were blown by the Packer when she saw the Wolverton were heard but not answered by the latter.

I decline to find otherwise than I have already found, except that

I find the compass course of the tug Dr. Wolverton to have been west northwest instead of N. W. by N. as originally made to appear by mistake.

Libellant's Exhibit A, marked this day, is admitted.

New York, Dec'r 4, 1886.

WM. J. WALLACE.

65 (Endorsed:) U. S. circuit court, southern district of New York. The New Jersey Lighterage Co. *vs.* The E. A. Packer, &c. Proposed additional findings of facts submitted on behalf of claimant. E. D. McCarthy, cl'm't's proctor.

We admit service of a copy of the within-proposed findings and notice of presentation of same to the court for Friday, October 22, 1886.

Oct. 21, 1886.

B., T. &. B.,
For Lib'l'ts.

SIRS: Please take notice that upon the settlement of the decree in within action the within-proposed findings on behalf of the claimant will be presented to the court and a motion made that said court find the facts as within proposed.

Oct. —, 1886.

E. D. McCARTHY, *Cl'm't's —.*

To Benedict, Taft & Benedict, lib'l'ts' —, 64 Wall St., New York.

66 The said circuit judge thereafter and after time taken for consideration filed with the clerk of the said circuit court his opinion, and also filed with said clerk the following findings of fact and conclusions of law:

67 U. S. Circuit Court, Southern District of New York.

THE NEW JERSEY LIGHTERAGE COMPANY
vs.
THE E. A. PACKER, &c.

WALLACE, *J.:*

The testimony in this case is unusually conflicting upon all material questions, and it will not be profitable to attempt to review the statements of the witnesses in detail or to elaborate the reasons for the conclusion which has been reached. The only theory of the facts which is consistent with the answer of the Packer and can be reconciled with the testimony of her pilot as first given and of her witnesses, James E. Purnell and Firman, is that the Packer came around the Battery about 200 yards off; had struck the ebb tide, which swung her further off; was making up the East River in a line somewhat parallel with the end of the piers, but swing-
68 ing in against the tide towards them, and was about opposite pier 1 when she saw the Wolverton. The Wolverton was at that time about 500 yards off, making across the river, heading

from a point somewhat below the Wall Street ferry on the Brooklyn side for a point above pier No 1, calculating to be carried, with her tow, by the force of the eddy off the Battery, but as near as she could go on a direct line for Communipaw ferry. Both vessels saw each other about the same time, and when they first saw each other the Packer had the Wolverton on her starboard bow and the Wolverton had the Packer on her port bow. The vessels were then on courses crossing each other and converging towards the New York shore, and it was the duty of the Packer, under the XIX rule of navigation, to keep out of the way. Her pilot wanted to save delay and escape encountering the greater force of the tide by keeping in towards the ends of the piers instead of going out. He was
69 a very ignorant pilot and relied upon a practice which prevails to a considerable extent for tows coming around the Battery near the shore to hug the shore.

The proofs show that when tows are swinging around the Battery into the East River from the North River they generally try to go within a couple of hundred feet of the shore, and when they keep within that distance approximately the right is very generally accorded to them by tows coming around the Battery from the East River to keep inside; but no practice is shown prevailing with that uniformity which is requisite to a usage applicable to the situation between the vessels here or which justified the pilot of the Packer in insisting upon the right of keeping inside. Relying partly upon the alleged usage and partly upon the supposition that the Wolverton would accord him the inside if signalled to do so, the pilot of the Packer immediately upon signalling by two blasts of his whistle put his wheel to starboard, thus bringing his boat nearer
70 to the New York shore and aggravating the chances of a collision.

Inasmuch as the libel filed against the Wolverton was dismissed by the district court of the United States for the eastern district of Pennsylvania—that court adjudged the Wolverton free from fault—it is not necessary to consider the question whether upon the proof here both tugs were in fault. It suffices that the libellant is entitled to recover against the Packer.

A decree is ordered for the libellant, with a reference to a commissioner to assess the damages, with cost of this court and of the district court.

71 [Endorsed:] U. S. circuit c't, so. dist. N. Y. The N. J. Lighterage Company *v.* The E. A. Packer, &c. Copy opinion. Edw'd D. McCarthy, cl'm't's proctor, 50 Wall St., N. Y.

72 U. S. Circuit Court, Southern District of New York.

THE NEW JERSEY LIGHTERAGE CO., Appellant,
vs.
THE STEAM-TUG PACKER, Appellee.

Upon this appeal the following facts are found:

First. That on the 25th day of October, 1880, the libellant was

the owner of the barge Atlanta and was a common carrier of a cargo on said barge, as alleged in the libel.

Second. That on that day, in the afternoon, a collision occurred been said barge and the barge Cross Creek No. 5, then in tow of the steam-tug Packer.

Third. That the barge Atlanta and her cargo were on that day taken in tow by the steam-tug Wolverton at Roberts' stores in the East River, to be towed to the Long dock, Jersey City, and were towed astern of said tug by a hawser of one hundred and fifty feet in length between the tug and barge.

Fourth. That on that day the tug Packer was bound from the North River into the East River, having in tow on her port
73 side the barge Cross Creek No. 5, loaded with about 450 tons of coal, the barge projecting beyond the bow of the tug.

Fifth. As the Wolverton, with her tow, was crossing the mouth of the East River the Packer, with her tow, was heading around the Battery into the East River, passing the New York shore opposite the barge office, nearly two hundred yards away.

Sixth. That the tide in the East River was ebb and about at full strength. The Wolverton and her tow were going with the tide about seven miles an hour and the Packer and her tow were proceeding against the tide at a speed of about two miles an hour.

Seventh. That the Packer and her tow had come so far around from the North River before seeing the Wolverton as to be in the ebb tide coming out of the East River, and when she saw her was heading up against that tide and was about 200 yards out from the shore opposite the barge office.

Eighth. The vessels saw each other when about 500 yards apart, and at that time the course of the Wolverton was about N. W. by N.* and the course of the Packer was E. by N., and as they approached each other the Packer had the Wolverton on her starboard bow and the Wolverton had the Packer on her port bow, the Wolverton being further out in the river from the New York shore than the Packer, and the vessels being upon crossing courses converging towards the New York shore.

74 Ninth. As soon as the Packer saw the Wolverton she blew two blasts of her steam-whistle. She was then under a starboard wheel and making in somewhat towards the end of the piers, but upon signalling the Wolverton she starboarded her wheel still more. The Wolverton made no reply to the Packer's signals, but kept on her course without abating speed until within about 200 feet. The Packer then blew two more whistles and reversed her engines and the Wolverton ported her wheel. The Wolverton passed the bow of the Packer and her tow, but the libellant's barge was unable to do so, and her port side came in collision with the bow of the Packer's tow.

Tenth. At the time the Wolverton ported her wheel danger of collision was imminent and a collision seemed unavoidable.

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* Original finding changed. Course "W. N. W." instead of "N. W. by N."—W. J. W.

Eleventh. There was nothing in the river to interfere with the navigation of either vessel. The collision occurred about 400 or 500 feet off the ends of the piers and just below the slip of the South ferry.

Twelfth. There was no local usage of navigation applicable to the situation of the vessels when they discovered each other.

Thirteenth. That between the tide of the East River and the North River there is an eddy which extends out about 400 feet from the barge office, and the Packer had passed through this eddy and reached the ebb tide, which struck on the port bow of her
75 tow and swung the vessels still further off shore before her pilot saw the Wolverton.

Fourteenth. The libellant's barge was in all respects properly navigated. By reason of the collision the barge and cargo sustained serious injury.

The following conclusions of law are found:

First. The two tugs being on crossing courses, it was the duty of the Packer, having the Wolverton on her starboard hand, to keep out of the way, and the duty of the Wolverton to keep her course. course.

Second. It was the duty of the Packer to port her wheel and stop and reverse her engine in time to avoid the collision.

Third. The libellant is entitled to recover against the Packer the damages sustained by the collision.

(Filed July 14th, 1886.)

(Endorsed:) U. S. circuit court, southern district of New York. The New Jersey Lighterage Company, appellant, *vs.* The Steam-Tug Packer, appellee. Copy findings.

76 To which findings of the circuit judge the claimant duly filed the following exceptions:

77 Circuit Court of the United States for the Southern District of New York.

THE NEW JERSEY LIGHTERAGE COMPANY, Libellant,
vs.
THE STEAM-TUG "E. A. PACKER," &c., JOHN SCULLY, Claimant.

Exceptions of Claimant to the Findings of Fact and Conclusions of Law Herein of the Circuit Court.

First exception. The claimant and appellant excepts to so much of the seventh finding of fact as holds that the tug "E. A. Packer" was two hundred yards out from the shore when she saw the tug "Wolverton," and that she, the "E. A. Packer," was heading against the tide.

On this subject the weight of testimony is that the tug "E. A. Packer" was not more than one hundred yards out, while the undisputed testimony is that she was still in slack water.

Second exception. The claimant and appellant excepts to the eighth finding of fact only in so far as it holds that the two tugs were approaching on crossing courses converging towards the New York shore, the "Packer" having the "Wolverton" on her own starboard bow and the "Wolverton" heading west northwest.

78 The ground of this exception is that the finding is unsupported by any testimony whatsoever. The tugs were not on courses crossing ahead and converging towards the New York shore. The course of the tug "Wolverton" was west and not west northwest. Their courses would not have crossed had not the "Wolverton's" course been changed.

This appellant excepts — so much of the eighth finding of fact which holds that the Wolverton was further out in the river from the New York shore than was the E. A. Packer.

Third exception. This appellant excepts to the whole of the tenth finding of fact on the ground that this finding is contrary to all the evidence in the case.

Fourth exception. This appellant excepts to so much of the eleventh finding of fact as holds that the place of collision was four hundred or five hundeed feet off the ends of the piers.

The ground of this exception is that the testimony of both sides agrees in making the place of collision not more than two hundred feet from the end of pier one.

Fifth exception. This appellant excepts to the whole of the twelfth finding of fact. The ground of this exception is that the finding is contrary to the testimony of either party.

Sixth exception. This appellant excepts to the thirteenth finding of fact. The ground of this exception is that the finding is contrary to fact.

79 Seventh exception. This appellant excepts to every one of the conclusions of law. To the first conclusion because (1) the two tugs were not approaching on crossing courses, or (2) if they were, then the duty of the E. A. Packer to keep out of the way was faithfully observed by her, but the Wolverton failed to keep her course and caused the collision.

To the second conclusion of law (I) because if the two tugs were approaching on crossing courses it was the duty of the Packer to starboard, not to port, her wheel, and (II) it was her duty not to stop and reverse, and there was no need for her to do so if the Wolverton held her course.

Eighth exception. The findings of fact do not sustain the conclusions of law.

These findings show that the Wolverton was further out in the river than was the E. A. Packer; that she, the Wolverton, was going rapidly with the tide, having a tow swinging her on a long hawser; that the courses were not crossing ahead, but were starboard to starboard; that the collision was solely produced by the Wolverton's porting her wheel and going across the bows of the E. A. Packer when she, the Wolverton, was too near the Packer to attempt such manœuvre with safety; that if on any construction it was the duty of the Packer to keep out of the way she, the Packer, properly dis-

charged that duty by giving a blast of two whistles and starboarding her wheel.

80 This appellant insists that the sole proximate cause of the collision was the rank and sudden sheer of the Wolverton across the Packer's bows.

Ninth exception. This appellant also excepts because the circuit judge refused to make the first proposed finding of fact submitted by the appellant.

The ground of the exception is that the said proposed finding is based on and supported by the testiment of the libellant's chief witness, to wit, the pilot of the tug Wolverton, and is not contradicted or impugned by any testimony whatsoever.

Moreover, the facts contained in the said proposed first finding are conclusive in their character and strictly determine the question as to whether or not the tugs were on courses crossing ahead and converging towards the New York shore.

Tenth exception. This appellant excepts to the refusal to make the third proposed finding of fact submitted by the appellant.

The ground of this exception is that the said proposed finding is supported by the testimony of the libellant's witness, the pilot of the Wolverton, and is contradicted or impugned by no other witness.

Eleventh exception. This appellant excepts to the refusal of the court to make the fourth proposed finding of fact.

81 The ground of this exception is the same as that on which the last exception was placed.

Twelfth exception. This exception is to the refusal of the court to make the fifth proposed finding of fact submitted by this appellant.

Thirteenth exception. This exception is to the refusal of the court to make the sixth proposed finding of fact submitted by the appellant.

The ground of this exception is that the fact contained in this proposed finding is of the utmost importance and determines the whole controversy, to wit, that the tug Wolverton did, when she was about two hundred feet away from the Packer, change her course by four or five points. It is a fact maintained and supported by the testimony of the libellant's chief witness, the pilot of the tug Wolverton, and is not contradicted or impugned by any other testimony.

Fourteenth exception. This exception is to the refusal of the court to make the seventh proposed finding of fact submitted by this appellant.

The ground of this exception is that the said proposed finding is supported by all the testimony alike of the libellant and the respondent.

N. Y., Dec. 29, 1886.

EDWARD D. McCARTHY,
Proctor for Claimant.

Endorsed: U. S. circuit court, southern district of N. Y.

82 The New Jersey Lighterage Company, libellant, plaintiff,

against The E. A. Packer, &c., defendant. Exceptions to findings of this court. Edward D. McCarthy, cl'm't's proctor, 50 Wall street, New York city. To Benedict, Taft & Benedict, proctors for libellants. Due and timely service of a copy of the within exceptions is hereby admitted. Dated N. Y., Dec. 31, 1886. Benedict, Taft & Benedict, proctors for lib'l'ts. U.-S. circuit court. Filed Dec. 31, 1886. Timothy Griffith, clerk.

That thereafter the said court made its final decree as follows:

83 At a stated term of the circuit court of the United States of America in and for the southern district of New York, in the second circuit, held at the court-rooms, in the city of New York, on the fourth day of December, 1886.

Present: The Honorable William J. Wallace, circuit judge.

THE NEW JERSEY LIGHTERAGE COMPANY, Libellants and Appellants,
vs.
THE STEAM-TUG E. A. PACKER, HER ENGINE, &c., JOHN SCULLY, Claimant and Appellee.

An interlocutory decree having been made herein on the 16th day of July, 1886, whereby it was ordered and adjudged that the decree of the district court made and entered herein on the 13th day of May, 1884, be in all things reversed, and that the libellants, The New Jersey Lighterage Company, recover the damages by them sustained by reason of the collision in the libel mentioned, with costs to be taxed, and that it be referred to a commissioner of this court to ascertain and compute such damages, *deed* such damages
84 having been fixed by consent at the sum of fifty-nine hundred and fifty-four $\frac{48}{100}$ dollars, with interest thereon from the 25th day of October, 1880, to date, and the libellants' costs having been taxed at the sum of two hundred and seventeen $\frac{43}{100}$ dollars for the district court and the sum of four hundred and twenty-six $\frac{35}{100}$ dollars for the costs of this court—

Now, on motion of Benedict, Taft & Benedict, libellants' proctors—

It is ordered, adjudged, and decreed by all the court that the libellants, The New Jersey Lighterage Company, recover of the steam-tug E. A. Packer, her engine, &c., the said sum of thirty-nine hundred and fifty-four $\frac{48}{100}$ dollars, together with the sum of fourteen hundred and forty-nine $\frac{83}{100}$ dollars, interest thereon from October 25, 1880, to date, amounting to the sum of fifty-four hundred and four $\frac{31}{100}$ dollars for their damages, and also the sum of six hundred and forty-three $\frac{78}{100}$ dollars, their costs as taxed, amounting in all to the sum of six hundred and forty-eight $\frac{9}{100}$ dollars, and that said steam-tug be condemned therefor.

And it is further ordered and adjudged that the stipulators for damages and costs cause the engagement of their stipulations to be performed.

And it is further ordered and adjudged that unless an appeal be

taken from this decree within the time limited by law and
85 prescribed by the rules and practice of this court the libellants have execution to enforce satisfaction of this decree.

WM. J. WALLACE.

(Endorsed:) U. S. circuit court, S. D. of N. Y. The New Jersey Lighterage Company *vs.* The Steam-Tug E. A. Packer, her engine, &c. Final decree. Benedict, Taft & Benedict, lib'l't's proct's, 64 Wall street, New York, N. Y.

SIR: Please take notice that we shall present the within decree to his honor Judge Wallace for his allowance and signature on the 18th day of Oct., 1886, at 11 o'clock a. m., at the court-room, in the P. O. building.

N. Y., Oct. 13, '86.

Yours, &c., BENEDICT, TAFT & BENEDICT,
Lib'l't's Proct's.

To E. J. McCarthy, Esq., cl'm't's proct.

Service of the within-proposed decree and notice of presenting same is admitted this 13 Oct., 1886.

E. D. McCARTHY,
Cl'm't's Proctor.

U. S. circuit court. Filed Dec. 4, 1886.

TIMOTHY GRIFFITH, *Clerk.*

From which decree the said claimant duly appealed to the Supreme Court of the United States.

86 Circuit Court of the United States for the Southern District of New York.

THE NEW JERSEY LIGHTERAGE COMPANY, Libellant,
vs.
THE STEAM-TUG "E. A. PACKER," HER ENGINES, &c., Whereof JOHN SCULLY is Claimant.

SIRS: Take notice that John Scully, the claimant herein, hereby appeals to the Supreme Court of the United States from the final decree entered herein in the office of the clerk of this court on the 4th day of December, 1886, and from every part thereof.

(S'g'd) EDWARD D. McCARTHY,
Proctor for Claimant.

To Benedict, Taft & Benedict, proctors for libellants.

To Timothy Griffith, clerk of the U. S. circuit court for the southern district of New York.

87 (Endorsed:) U. S. circuit court, southern district of New York. The New Jersey Lighterage Company *vs.* The Steam-Tug "E. A. Packer," her engines, &c. Notice of appeal. Edward D. McCarthy, claimant's proctor, 50 Wall St., N. Y. To Benedict,

Taft & Benedict, libellant's proctors, 64 Wall St., N. Y. To Timothy Griffith, clerk of the U. S. circuit court for the southern district of New York.

We admit due and timely service of a copy of the within notice this 8th day of January, 1887.

(S'g'd) BENEDICT, TAFT & BENEDICT,
Lib'l't's Proctors.

(File-mark:) U. S. circuit court. Filed Jan. 8, 1887. Timothy Griffith, clerk.

88 Circuit Court of the United States, Southern District of New York.

THE STEAM-TUG "E. A. PACKER," HER ENGINES, TACKLE, APPAREL, &c.; JOHN SCULLY, Claimant and Appellant,
ads.
THE NEW JERSEY LIGHTERAGE COMPANY, Libellant and Appellee.

To the honorable the Supreme Court of the United States:

The appeal of John Scully, the above-named claimant and appellant, respectfully showeth—

That on the 29th day of October, 1880, the above-named The New Jersey Lighterage Company, a corporation, filed its libel in the district court of the United States for the southern district of New York against the above-named steam-tug E. A. Packer, her engines, &c., and also against the steam-tug Dr. John Wolverton, her engines, &c., in a cause of collision, civil and maritime, for the recovery of
89 damages alleged to have been sustained by it, said corporation, to the barge "Atlanta" and her cargo by collision with said steam-tugs E. A. Packer and Dr. John Wolverton off South ferry, East River, New York city, on the 15th day of October, 1880, and that process was duly issued against said steam-tug Dr. John Wolverton, but service was not made upon her, she having departed from the jurisdiction of said district court; that your petitioner duly appeared and bonded the steam-tug "E. A. Packer," which tug was within the jurisdiction of said court at the time, and your petitioner thereupon filed his answer to said libel, and such proceedings were had in the said cause that on the 13th day of May, 1884, a final decree was made and pronounced therein by the said district court dismissing the said libel with costs.

That after such final decree the said libellant and appellee duly appealed therefrom to the circuit court of the United States for the southern district of New York, and the said cause was re-
90 moved thereby into the said circuit court, additional testimony taken therein on behalf of said libellant, and the cause tried anew, and such proceedings were had in the said circuit court that afterwards, on the 4th day of December, 1886, the said circuit court made its final decree in the said cause, whereby it was decreed that the said decree of the district court dismissing said libel be in all things reversed, and that the libellants, The New Jersey Light-

erage Company, recover the damages by them sustained, with costs, and which damages and costs were fixed at the sum of six thousand and forty-eight dollars and nine cents ($6,048.09), and that execution issue therefor, as by reference to said decree will more fully appear, which said decree of the said circuit court is, as this appellant is advised, erroneous and ought to be reversed.

Wherefore this appellant appeals from the whole of said decree of said circuit court to the Supreme Court of the United States, and respectfully prays that the decree of the said circuit court and the
91 libel, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear said cause anew, and that said decree of the circuit court and every part thereof may be reversed, and a decree made dismissing said libel with costs, or such other decree as to the said Supreme Court shall deem just.

Dated New York, December 13th, 1886.

(S'g'd) EDWARD D. McCARTHY,
Proctor for Appellant.

The foregoing appeal is hereby allowed.
Dated New York, Jan'y 8th, 1887.

(S'g'd) WM. J. WALLACE.

(Endorsed): U. S. circuit court for the southern district of New York. The New Jersey Lighterage Company, libellant, against The Steam-Tug "E. A. Packer," her engines, &c., John Scully,
92 claimant. Petition of appeal. Edward D. McCarthy, proctor for claimant and appellant, 50 Wall street, New York city. (File-mark:) U. S. circuit court. Filed Jan. 8, 1887. Timothy Griffith, clerk.

93 U. S. Circuit Court, Southern District of New York.

THE NEW JERSEY LIGHTERAGE COMPANY, Libellant and Appellee,
ag'st
THE STEAM-TUG E. A. PACKER, HER ENGINE, &c., JOHN SCULLY, Claimant and Appellant.

It is hereby stipulated and agreed on behalf of the libellants and appellees and the claimant and appellant in the above-entitled action that the sum of seventy-five hundred dollars be deposited in the above cause in the Farmers' Loan and Trust Company in the city of New York, which sum and the accumulation of interest on the same shall be as and for security for the damages and costs on the appeal of the claimant and appellant herein from the final decree made and entered herein on the 4th day of December, 1886, to the Supreme Court of the United States, and that said sum
94 shall not be withdrawn from said trust company except upon the joint consent of the proctors for the libellants and appellees and the proctor for the claimant and appellant in this action or upon the order of this court.

But it is understood and agreed that if the claimant and appellant shall desire to withdraw said sum of seventy-five hundred dollars and all accumulations of interest thereon before the final determination of this action he shall be at liberty to do so, upon giving good and sufficient security, as required by law, upon the said appeal, to be duly approved by this court, and the proctors for the libellants and appellees will then join in a consent with the proctor for the claimant and appellant to draw such money from said trust company on said bond being so approved.

The depositing of such sum of seventy-five hundred dollars shall operate and be a stay of all proceedings on the appeal herein from the said final decree in this case.

95 The certificate issued by the said trust company for said sum shall be held by the said trust company, and for which certificate a duplicate receipt shall be given, and the said money so deposited shall be held subject to the joint consent of the proctors in this case or the order of the court, as above provided and agreed.

Dated N. Y., Dec. 20th, 1886.

(Signed) BENEDICT, TAFT & BENEDICT,
Appellee's Proctors.
EDWARD D. McCARTHY,
Cl'm't's Proctor.

I hereby certify that there has been deposited with the Farmers' Loan and Trust Company seventy-five hundred dollars, for which duplicate receipts have been issued. This deposit — in accordance with the terms of above stipulation.

New York, 20 Dec'r, 1886.

$7,500. THE FARMERS' LOAN AND TRUST COMPANY,
By WM. H. LEUPP, *Sec'y.*

(Endorsed:) U. S. circuit court, S. D. of N. Y. The New Jer-
96 sey Lighterage Co. *vs.* Steam-Tug E. A. Packer, &c. Stipulation. Benedict, Taft & Benedict, appellee's proctors, 64 Wall St., New York, N. Y.

(File-mark:) U. S. circuit court. Filed Jan. 8, 1887. Timothy Griffith, clerk.

97 By the Honorable William J. Wallace, judge of the circuit court of the United States for the southern district of New York, in the second circuit, to the New Jersey Lighterage Company:

Whereas John Scully, claimant of the steam-tug "E. A. Packer," her engines, &c., has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of New York, in the second circuit, made in favor of you, the said New Jersey Lighterage Company, against the said steam-tug "E. A. Packer," her engines, &c., and has filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of

Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the second circuit, the eighth day of January, in the year of our Lord one
98 thousand eight hundred and eighty-seven.

(S'g'd) WM. J. WALLACE,
Circuit Judge.

(Endorsed:) U. S. circuit court for the southern district of New York. The New Jersey Lighterage Company, libellant, against The Steam-Tug "E. A. Packer," her engines, etc., John Scully, claimant. Citation. Edward D. McCarthy, proctor for claimant, 50 Wall street, New York city. To Benedict, Taft & Benedict, proctors for libellants, 64 Wall St., N. Y. Due and timely service of a copy of the within citation is hereby admitted. Dated N. Y., Jan'y 8th, 1887. (S'g'd) Benedict, Taft & Benedict, proctors for libellants.
(File-mark:) U. S. circuit court. Filed Jan'y 11, 1887. Timothy Griffith, clerk.

99 And inasmuch as the said several matters produced and given in evidence on the trial in said circuit court do not appear by the record of the decree of the said circuit court, the counsel for the said claimant has proposed and caused this bill of exceptions to be settled and signed as a record hereof according to the form of the statute in such case made and provided and the course and practice of the courts, and to be signed and ordered on file by the circuit judge.

Dated this 19th day of October, 1887.

WM. J. WALLACE.

(Endorsed:) U. S. circuit court, so. dist. of N. Y. The New Jersey Lighterage Company, libellant, ag't The Steam-Tug E. A. Packer, &c., defendant. Claimant's proposed bill of exceptions. E. D. McCarthy, proctor for claimant, 50 Wall St., New York city.
100 Due and timely service of within-proposed bill of exceptions is hereby admitted. Dated Oct. 12, 1887. Within bill of exceptions agreed to Oct. 14th, 1887. Benedict, Taft & Benedict, pr. for lib't & appellee. E. D. McCarthy, proctor for appellant. Filed Oct. 19th, 1887.

101 U. S. Circuit Court, Southern District of New York.

THE NEW JERSEY LIGHTERAGE COMPANY
vs.
THE STEAM-TUG E. A. PACKER, &c.

Claimant's time to file bill of exceptions herein is extended five (5) days from date.

Oct. 8, 1887.

BENEDICT, TAFT & BENEDICT,
Lib'l't's Proctors.

We hereby consent that the claimant's time to file bill of exceptions herein be extended one week from October 14, 1887, and that the time for the clerk of this court to make his return herein to the United States Supreme Court be extended one week from October 14, 1887.

N. Y., Oct. 13, 1887.

BENEDICT, TAFT & BENEDICT,
Lib'l't's Proctors.

(Endorsed:) U. S. circuit court, southern dist. of N. Y. The New Jersey Lighterage Company, libellants, against The Steam-Tug "E. A. Packer," her engines, &c. Consent extending time to file bill of exceptions. Edward D. McCarthy, proctor for cl'm't, ap'e't, 50 Wall street, New York city. U. S. circuit court. Filed Oct. 14, 1887. Timothy Griffith, clerk.

102 U. S. Supreme Court.

THE NEW JERSEY LIGHTERAGE COMPANY, Appellee,
vs.
THE E. A. PACKER, &c., Appellant.

The time for the circuit court clerk to file the return on appeal herein to the Supreme Court is extended to and including October 24th, 1887.

BENEDICT, TAFT & BENEDICT,
Pro. for N. J. L. Co.
EDWARD D. McCARTHY,
Proctor for Appellant.

N. Y., Oct. 21st, '87.

Endorsed: New Jersey Lighterage Co. *vs.* The E. A. Packer. Consent extending time of clerk to file return. U. S. circuit court. Filed Oct. 22, 1887. Timothy Griffith, clerk.

103 UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

Seal of U. S. Circuit Court, South. Dist. New York.

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to one hundred and two, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The New Jersey Lighterage Company, libellant & appellee, against The Steam-Tug "E. A. Packer," her engines, tackle, apparel, &c., John Scully, claimant & appellant, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern dis-

trict of New York, in the second circuit, this 24th day of October, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the said United States the one hundred and twelfth.

TIMOTHY GRIFFITH, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 286. The Steam-Tug "E. A. Packer," her engines, &c., John Scully, claimant, appellant, *vs.* The New Jersey Lighterage Company. Filed October 27, 1887.

Office Supreme Court U. S.
FILED,
MAR 31 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1890.

No. 286.

The Steamtug "E. A. PACKER," her Engines, &c.,
JOHN SCULLY,
Claimant and Appellant,

vs.

THE NEW JERSEY LIGHTERAGE COMPANY,
Libellant and Appellee.

BRIEF ON BEHALF OF APPELLANT.

McCARTHY & BERIER,
Proctors for Appellant.

U. S. Supreme Court.

THE NEW JERSEY LIGHTERAGE COMPANY,
Libellant and Appellee,

against

The Steam-tug "E. A. PACKER," &c., JOHN SCULLY,
Claimant and Appellant.

Brief on behalf of the "E. A. Packer," &c., John Scully Claimant and Appellant.

The above cause is an admiralty action *in rem*, brought by the libellant as owner of the cargo on board the barge "Atlanta," lost through the collision hereinafter referred to.

The Atlanta left Roberts' stores, East river, Brooklyn, near Wall street ferry, about four o'clock in the afternoon of the 25th day of October, 1880, in tow of the steamtug Dr. John Wolverton, on a hawser about one hundred and fifty feet in length, bound for Communipaw, New Jersey.

The weather was clear, and the tide running ebb, strongly.

At about that time the tug E. A. Packer was rounding the Battery from the North into the East river, having a barge, loaded with coal, lashed to her port side.

The Packer, as found by the Circuit Court, was about 600 feet off the Barge office, and heading E. by N.; and the "Wolverton" about 1,500 feet distant from her, about in the middle of the East river, off Pier No. 6, New York, and heading W. N. W. or W. by N., when the two tugs first sighted each other.

The Packer was making somewhat in towards the New York shore, under a starboard wheel; and the Wolverton was heading so as to pass the Barge Office about 600 or 700 feet off. The Packer blew a signal of two whistles to the Wolverton as soon as she saw her, which the latter did not answer, and then starboarded her helm still more.

The two tugs approached each other, on these courses, until about 200 feet apart, when the Wolverton, suddenly, and without signalling, ported her helm; thereby changed her course about five points, crossed the Packer's bow, and so brought the port-side of her tow, the Atlanta, into collision with the bow of the coal barge alongside of the Packer.

The error in the decree of the Circuit Court was in holding the Packer responsible for the collision, instead of finding that the collision was solely caused by the sudden and improper change of course on the part of the Wolverton.

We were respondents in the Courts below, and claimants of the E. A. Packer, the steam-tug which was condemned by the Circuit Court.

On the hearing of this appeal no allusion will be made to any disputed fact, and, therefore, only a small part of our own testimony is presented.

Any finding of the Circuit Court, which is supported by evidence, will be accepted as conclusive.

Indeed, we now rest our case on the findings of the Court below, subject, however, to the following exceptions:

(I.)—The tenth finding, (fol. 74,) which is merely inferential, is erroneous.

(II.)—Additional facts, which were submitted by the respondents, should have been found, because they were material and ultimate, and were not disputed or questioned. *Indeed, they were given by the libellant's testimony.*

It is not unfair criticism to say that the findings, actually made, are meagre and insufficient.

Thus: (I.)—The place of collision is not accurately given; which is, necessarily, one of the most important facts in such a controversy as this is.

(II.)—While the Court finds that our opponent's tug, the Wolverton, did port her wheel just before the collision, it is not declared how great this sheer, to starboard, was. This fact is all important. The sheer is frankly conceded by the libellant's witnesses, to have been *five points*. Seeing that to port the wheel, at all, was an act contrary to the statute (*vide* eighth finding); was, presumptively, a proximate cause of the collision; surely, it is of "ultimate" importance, to know how great was this misdirection.

Had the Circuit Court found the undisputed facts, herein, as we requested; then it would clearly have appeared, that the tenth finding was wrong, and that danger of collision had *not* been imminent, prior to the moment when our opponent threw his wheel to port.

(III.)—Although the Court found that our tug, the Packer, starboarded her wheel as soon as the approaching vessel was seen, and continued to starboard "still more" ; yet it is not found, *how much* she starboarded.

But we are as much to blame as anybody, for this mischance. We did not request a finding on that subject, as we ought to have done.

But the uncontradicted evidence of our opponent shows, that our sheer to port *i. e.*, towards the piers, was, at least, over five points; and it is believed that the Court will permit us to cite this testimony, in order to elucidate any other points which may be in doubt.

(IV.)—The Court found that the tug Wolverton was further out in the river, from the New York shore, than was the Packer, when the approaching vessels saw each other ; but, unfortunately, did not find how much further out in the river she was.

Now, this is the most important fact in the case, and it reposes on the uncontradicted testimony of the libellant's pilot. Had our proposed finding been given (fol. 63) ; then it would have been clear, to a demonstration, that the sole proximate cause of the collision, was the fact that the tug Wolverton ported her wheel, just before it occurred.

———

Neither is it unfair, to call attention to the opinion of the Court below. It does not seem to cover the controversy. Taken in connection with the findings of fact, (which are quite as narrow), it suggests that both were hastily, and immaturely, conceived. The censure of our pilot was undeserved. This witness wilted, a little, under cross-examination as many others have done ; but

he immediately put himself right, and, on the whole, gave a clear statement of facts. *He was approved by the District Judge who saw and heard him.*

On the authority of The Francis Wright, we invite attention to the following findings of fact, that were proposed by us. We assert that they were material, and ultimate, *and were sustained by the uncontradicted testimony of the libellant's pilot.* Had these findings been given by the Circuit Court, the libel must have been dismissed there, as it had previously been dismissed by the District Court. Thus :

"(1.) The steam-tug Wolverton was, at or about the "same time, crossing the mouth of the East River from "a point at, or near, Roberts' stores, Brooklyn. She was "hauling, on a hawser, the barge Atlanta, owned by the "libellant ; and the length of the hawser, between the "tug and tow, was not less than 150 feet. From the "stem of the tug Wolverton to the stern of the barge "Atlanta was not less than 300 feet. After leaving "Roberts' stores, Brooklyn, the course of the Wolver- "ton was about W. by N., and, if held unchanged, would "have brought up at a point below Communipaw dock, "Jersey City, and would have cleared the new Barge "Office, and the Battery, 600 or 700 ft." (Fol. 61.)

This request was renewed, (fol. 63), in almost the same language.

It was refused.

Our exception, to this refusal, is on page 54 (fol. 80), and reads as follows :

"This appellant also excepts, because the Circuit "Judge refused to make the first proposed finding of "fact, submitted by the appellant.

"The ground of the exception is, that the said pro-
" posed finding is based on, and supported by, the testi-
" mony of the libellant's chief witness, to-wit, the pilot
" of the Wolverton, and is not contradicted, or impugned,
" by any testimony whatsoever.

"Moreover, the facts contained in the said proposed
"first finding are conclusive in their character. and
" strictly determine the question as to whether the tugs
" were on courses *crossing, and converging*, to the
" New York Shore."

Here is the testimony of the proposed finding, *and all of it.* Thus:

Schultz, pilot of the Wolverton, says (page 18 *et seq.*):

" When I first saw the Packer she was six or seven
" hundred yards away, I should judge, will not be cer-
" tain, but I think it about that. * * The Wolverton
" (his own vessel) was then between Piers 2 and 3, New
" York side, three or four or five hundred feet off,
" about five hundred feet off, and then saw the Packer
" seven hundred yards off; then I was going down
" gradually across the tide, probably heading for the
" Central Railroad, New Jersey, then I was about five
" hundred feet off Pier 2 or 3; then the Packer was
" headed directly in the river—straight up the East
" river. We were not approaching each other head on
" before the collision; I straightened up on that hawser
" along the Brooklyn shore, and the barge went down
" by me, and I turned around and came out to the East
" river, a little porting on New York, and heading for
" just below the Communipaw dock, *a straight line*
" *from Roberts' stores*, clearing the Battery four or five
" hundred feet. * * * * * I was abreast of Har-
" beck's stores before I got her swung on the hawser; I
" got up very near, as far as Harbeck's store, before
" I got straightened.

"My course then was 400, or 500, or 600 feet off Pier "1. Just below Communipaw dock would be in a "direct line from where we straightened out on the "barge and where the collision occurred. I could take "a straight course after I straightened on my hawser, "and make for a little below the Communipaw ferry, "and clear the Battery by 400 or 500 feet. My course "was across and down the river on an angle. The tide "was running straight, and we were bound in that "course with the tide and a little angling across * I "suppose my compass course was about west northwest.

"Q. How does it happen that you got so near Pier 2 "as you have described, provided the course you were "holding would carry you 400 or 500 feet clear of the "Battery:

"If I said clear of the Battery, I made a mistake. I "didn't mean the Battery, *it would carry us further "off from the Battery than that.* * * * It would "be 600 feet off the Battery. * * * We would go "175 feet further off from the Barge Office than from "Pier 2. * * * Pier 1 is to the eastward of the "Barge Office about 150 feet. * * * From the time "I straightened up I kept a steady wheel. * * * "I did not endeavor to keep up stream; the tide wasn't "sending us out far enough for that; provided nothing "got in the way, I intended to make a straight course "from Roberts' stores to a point a little below Com- "munipaw Ferry, * * * about 600 or 700 feet off "the Barge Office; about 600 feet probably. * * *

"Q. How near to Pier 6 did you come when you were "abreast of it?

"A. I don't know how far. I suppose we *were in "the middle of the river when we came by Pier 6.*

"Q. When you first saw the Packer about a quarter "of a mile away from you she was about opposite the "new barge office?

"A. I should think so as nearly as I can recollect "now ; yes, sir.

"Q. And when you came into collision she was "where?

"A. Off South Ferry slip, abreast of one or two "there.

"Q. How far off South Ferry slip do you suppose the "collision occurred?

"A. *I couldn't say exactly; two hundred feet, I sup-* "*pose, off the end of the pier.*"

On page 23 the same witness corrects his previous testimony and says that his compass course was W by N.

On page 24, replying to libellant's advocate, he says: "*Up to the time when I ported with my wheel there had* "*been no time when I was going parallel with the line* "*of the ends of the piers.* * * * My course from "Roberts' stores was bearing rather on to Pier 2, just "400 or 500 feet off. From Roberts' stores we crossed "the river to the westward and northward, partially "across the river. * * * My barge followed right "after me. *We were going with the tide and so little* "*across it that the sag was not perceptible at all.*"

Let us now read the findings of fact. They were drawn with the utmost strictness against us; every possible doubt was resolved to our disadvantage. Nevertheless, when read in connection with the foregoing testimony (which fully sustains our proposed conclusions, and is the uncontradicted deliverance of our opponent's chief witness), *they show that collision was not imminent, when the Wolverton disobeyed the law, by porting her wheel.* On the contrary, they show that if both vessels had kept their respective courses,

there would have been no collision ; because the Wolverton would have gone far astern of the Packer.

Says the Circuit Court : (I.) When the vessels first saw each other, they were 500 yards apart, (Eighth Finding).

(II.)--At this time, the Packer was about 600 feet off the Barge Office, and was heading up against the tide. She, the Packer, was heading E. by N., (Eighth Finding).

(III.)--At this time, the Wolverton was further out in the river than the Packer, and was heading about W. N. W. (Wrong ; she was heading W. by N. *Vide Sup.*). (Eighth Finding).

(IV.) As soon as the Packer saw the Wolverton, she blew two blasts of her whistle. She was then under a starboard wheel, and making in, somewhat, towards the ends of the piers, but upon signalling the Wolverton, she starboarded her wheel still more, (Ninth Finding).

(V.)—The Wolverton made no reply to the Packers' whistle, but kept on, with unabated speed, till she was 200 feet away, and then she ported her wheel (Ninth Finding).

(VI.)—The collision occurred about 400, or 500 feet off the ends of the piers, just below the slip of the South Ferry.

Consider now, *that* the Wolverton was in the middle of the river when she was off pier 6 ; *that* she passed pier 2, some 400 or 500 feet away ; *that* she would have passed the Barge Office 600, or 700, feet off ; is it not demonstrably clear, that there would not have been a collision, had both vessels kept their respective courses, from, and after the moment when they first saw each other ?

We have annexed to this argument, a diagram which is strictly correct, on the basis of the findings of fact. This diagram gives the positions of the vessels when they first saw each other, and when the barges came into collision; it shows, also, the angle made by the Wolverton, when she ported her wheel.

Our vessel was heading E. by N. into the East river, and "bucking" the tide under a starboard helm. Every revolution of the wheel brought her nearer to the piers, and, of course, further away from the point of possible intersection of lines of approach.

Manifestly, the Wolverton had nothing to do but keep her course. She would then have gone at least 200 feet astern of the Packer.

It falls to be considered, also, that the Packer had gone in at least 100 feet, while the Wolverton was approaching her "*at unabated speed.*"

And the place of collision is where the Wolverton could never have been, had she kept her course.

(I.)—She got there only by porting her wheel five points (*Vide infra*).

(II.)—Her original course would have carried her 150 feet further out, as her pilot repeatedly asserted.

This conclusion follows on what we have already shown.

Hanging upon this question, is our sixth proposed finding of fact, which had already been proposed in the fourth original request (fols. 62, 64).

"The porting of the Wolverton's wheel, when she "was about 200 feet from the Packer, was a change of "four, or five, points from her course."

This request was refused.

Our exception to the refusal of this request, is at fol. 81, and reads as follows:

"The ground of this exception is, that the fact contained in the proposed finding, is of the utmost importance, and determines the whole controversy, to wit: that the tug Wolverton did, when she was about 200 feet away from the Packer, change her course by four or five points. It is a fact maintained, and supported, by the libellant's chief witness, the pilot of the tug Wolverton, and is not contradicted, or impugned, by any other testimony."

Here is the testimony to support this exception, and the whole of it. Thus Schultz, the Wolverton's pilot, replying to a direct question, says (page 18, fol. 23):

"I put my wheel aport. I hadn't time for a whistle.

"Q. How much of a change in the course of the Packer did she make on the starboard wheel?

"A. Four or five points.

"Q. How much of a change did your port wheel make on your boat?

"A. About the same."

So there was a change of courses, according to pilot Schultz, of *ten points;* our tug trying to get out of the way, (assuming, now, that they were on crossing courses, as the Court found that they were,) and the Wolverton following her.

So, too, Mr. Schultz's excuse, for not having responded to our whistle, is invalid; because the Court found that the tugs were 500 yards apart, when the Packer gave her first signal, and took a starboard wheel (fols. 73–74).

Were we not entitled to this sixth finding proposed by us? That it was material, no one will deny. A change of course of five points, made by a vessel going 7 or 8 miles an hour, is a serious change; when it is made, contrary to a rule of navigation, it is fatal to any cause, if it is not explained.

It is fair to presume, that the Circuit Court would have dismissed the libel, had the original course of the Wolverton, and her rank change of course, just before the collision, been duly considered.

We show beyond any doubt, by the uncontradicted testimony of our opponent, that this collision could not have occurred, had the two vessels held their courses. Our proposed findings concentrate the testimony, and lead to no other conclusion.

Closely connected with this fact, is its correlative; that the Packer *starboarded her wheel five points.* There is no such finding of fact, and we did not request one. But still, the uncontradicted testimony of the fact is before you. But if it is entirely disregarded, there is enough in the findings of the Court, to show the same thing.

Thus: The Packer was making about two miles an hour, while the Wolverton's speed was about seven miles an hour. (Sixth Finding)

The Packer was about 200 yards from the Barge Office when the vessels saw each other (Seventh Finding); she was about 500 yards away from the Wolverton (Eighth Finding); and was making in, somewhat, towards the end of the piers; the collision occurred 400 or 500 feet off the end of the piers, and just below the slip of the South Ferry. (Eleventh Finding).

In other words, the Packer had gone in towards the piers, *at least 100 feet, while the Wolverton was laying the intervening 500 yards behind her, and before she had ported her wheel.*

This amounts to the same result, as if the Court had found, that the Packer starboarded her wheel five points.

If the Wolverton had not changed her course, she would have passed the Packer's starboard side, by 400 feet, at least.

It is useful to consider, here, the question, why the Wolverton changed her course.

Upon the facts, as found, to wit; that the courses of the vessels were crossing, and converging, on the New York shore, this conduct was fatal, as well as unlawful, and inexplicable.

The answer is obvious. Thus: the libel alleges, in substance, that the approaching vessels had, each the other, *on her own port-side.* (Fol. 2, page 1).

Schultz everywhere testifies, that the Packer and Wolverton had never been "head on;" that the Packer seemed to be coming up the bay from Bedloe's Island, and was making right for his port-side. Hence it was necessary for him to port his wheel, in order to get out of her way.

The District Court asserted, that Mr. Schultz had mistaken some other tug for the Packer (fol. 12, page 8).

Another most important conclusion of the Circuit Court, should be noticed here.

"There was nothing in the river to interfere with the "navigation of either vessel."

In other words, *the whole bay lay on the Wolverton's port hand.*

When 500 yards away, the Packer was already under a starboard-wheel, and making in "somewhat" towards the piers. She gave the appropriate signal, *to which the Wolverton made no reply;* whereupon the Packer starboarded "still more," because she rightfully believed that her neighbor's silence was equivalent to acquiescence. The Packer, too, was burdened with a heavy tow, lashed to her port side. In the face of these facts, the Wolverton took a rank sheer to starboard!

It might be too much to say, that she ought to have starboarded her wheel by a half-spoke ; *sheered the other, and the safe way, just a half-point ;* no, everything must betaken against us, on the conclusions below. We can assume nothing against our opponent, which hazards an argument ; for our own vessel, nothing that is not absolutely demonstrable. Even so : but then the Wolverton was solely to blame, because she defied a manifest danger, *by porting her wheel.*

The purpose of the foregoing argument is to show that the inferential tenth finding of fact, "that collision was imminent, &c.," is wrong.

This amounts to the same thing as to show, that the sole proximate cause of the collision, was the porting of her wheel by the Wolverton.

We made other requests, which were refused, although based on facts which were not disputed. We pass these over, because they add nothing to the force of the preceding argument. It now becomes our duty to consider, whether on such grave exceptions, this Court can, and ought, to reverse the decree.

It is nothing to say that the claimant was treated unjustly by the Circuit Court ; that the careful and studious opinion of the District Judge is an unanswerable argument for us ; that the libellant's testimony exonerates the Packer from the fault attributed to her by the Circuit Court, seeing that his charge was based on the assertion that the tugs were approaching *port* to *port*, while the Circuit Court condemned the Packer, because she had the Wolverton on her starboard side. We must enforce the proposition that, if material requests were denied, and the exceptions show, that they were

supported by uncontradicted testimony, then there must be a reversal.

This case seems to be within the principle of the Francis Wright (105 U. S. R., 381), where the Court said:

"It is undoubtedly true that if the Circuit Court "neglects or refuses, on request, to make a finding one "way or the other on a question of fact material to "the determination of the cause when evidence has "been adduced on the subject, an exception to such "refusal taken in time and properly presented by a "Bill of Exceptions, may be considered here on ap-"peal. * * *

"The refusal to find would be equivalent to a ruling "that the fact was immaterial. * * * This is "a question of law and a proper subject for review in "an appellate Court. But this rule does not apply to "mere incidental facts, which only amount to evidence "bearing on the ultimate facts of the case. Questions "depending on the weight of evidence are, under the "law as it now stands, to be conclusively settled below, "and the fact in respect to which such an exception "may be taken must be one of the material and ultim-"ate facts on which the correct determination of the "cause depends."

In the case of Merchants Ins. Co. *vs.* Allen (121 U. S., R., 71), the foregoing principle was affirmed. In both cases the Court, in effect, says: If the fact embraced in a request is incidental, or is useful merely as evidence of a more important fact, an exception based on it, will not be considered here. But, if the fact is material, and ultimate, the exception covering it will be considered, because it presents a matter of law.

And this means, we presume, that consideration of such a material, and ultimate fact, must lead to a re-

vesal of the decree; the obvious purport of the words "material and ultimate," is nothing less.

Because if, in a given case, the Circuit Court refused a material, and ultimate, request, which was supported by uncontradicted evidence, we must presume that it did so for the reason that this fact was deemed to be incidental, merely, we ought not to say, that the action of the Court was capricious, or malicious, or designedly destructive of justice.

Now, when this Court, on review, says that the fact was material, and ultimate, it intends to say that the decree of the Circuit Court was wrong.

Whether a difference of meaning is carried by the words "material" and "ultimate," in the former opinion of this Court, we do not know.

It is not easy to see that there is any difference.

A material fact weighs as much as an ultimate one. But, if it is conceded that ultimate means determining, conclusive all-controlling; even so, these exceptions, (the two heretofore presented), do contain such ultimate facts. *They prove that the collision could not have happened, if the Wolverton had not changed her course five points, by porting her wheel.*

The Circuit Court erred when it held that:

"It was the duty of the Packer to port her wheel "and stop and reverse her engine in time to avoid the "collision." (Second Conclusion of Law, page 52).

The libellant asserted, that the tugs were approaching, *port to port;* the claimant asserted, that they were approaching *starboard to starboard* (see the libel and the answer), and so the District Court held (fol. 12, page 8).

But the Circuit Court said that they were approaching *starboard to port;* that our tug had the Wolverton on her starboard hand; that, consequently, it was her duty to keep out of the way, and that of the Wolverton to keep her course.

There is some evidence to support the finding of an intersecting approach, although very slight, and contrary to the respective pleadings. We are, therefore, bound by it. But it was error of law to say, that the Packer was obliged to keep out of the way, *by going in one direction only.*

(I.)—If it was her duty to keep out of the way, *then she had the right* to choose her road.

It would be arbitrary to impose a duty, and, at the same time, to limit the discharge of it, by an anticipatory rule.

(II.)—If any rule of a subordinate body, say of the Board of Inspectors, prescribed a particular course, it would be invalid, because it would be contrary to the spirit of the 19th rule of navigation.

(III.)—Nor does the Inspector's diagram of the so called 5th situation, upon which the Circuit Court probably relied, have the force of a rule.

It is advisory merely; and the diagram of the 5th situation is not a plan, which correctly shows the approach of these vessels.

(The whole subject is carefully discussed in the opinion of the District Court. See, particularly, pages 7 and 8, fols. 10–12.)

(IV.)—But, if we waive the foregoing considerations, still the 24th rule permits deviation from any previous rule, when circumstances seem to justify deviation.

This was an exceptional case. The Packer had come

down the North River, and was rounding the Battery, on her course of E. by N., "heading up into the East river."

She was stemming the strong ebb-tide. On her port-side she carried a heavy tow, whose momentum would make her sag inshore. She saw the Wolverton in the middle of the river, coming at high speed, with a hawser-tow dangling behind her. She was bound to see, that the Wolverton's course, *if continued*, would carry the Wolverton further away from the piers than the Packer could, at any time, be.

Assuming, now, that a port-wheel would have been obedience to the rule, ordinarily; was not this a case of "special circumstances"?

If the Packer had ported her wheel, and the other had continued her course, as she was bound to do, the chances of collision would have been multiplied. She could not, easily, have circumnavigated the Wolverton.

A starboard wheel offered an absolutely safe course, if the Wolverton had observed the law.

The diagram, herewith submitted, illustrates the fact.

(V.)—As soon as the Packer saw the other vessel, she declared that she would starboard her wheel, and go in still further.

No reply was given to this signal. The Wolverton held her course, and the Packer had sufficient reason to believe that she would continue thereon. *Silence, in such a case, meant acquiescence.*

Suppose, however, the Packer fell in doubt, because her opponent had not replied to her signal; what was she to have done?

She was already further in, than the Wolverton; she was making in still more, there was no possibility of collision, if the courses were held.

It was her duty, therefore, to keep her sheer.

To have stopped, and reversed, was needless, and would have been dangerous, considering the speed of the Wolverton.

(VI.)—The Circuit Court erroneously held, in the law-conclusion now criticised, that the Packer ought to have stopped, and reversed.

Until the Wolverton ported her wheel, no reason existed to do such a thing; to have done it, would have been a culpable mistake; *after* the Wolverton had ported her wheel, it was too late.

The Packer did then execute the maneuver, but it was in vain, as would have been anything possible for her to do.

The supreme fact is, that the Wolverton committed a flagrant fault. She recklessly disobeyed the rule of navigation.

She had miles of free water on her larboard side; she had the facility of keeping off. For her to have starboarded her wheel one-half point, or less, would, however, have required some slight effort.

So, she must be excused, it will be urged, for this omission of duty.

But how can she be excused for not having kept her course! For the gross fault, of having hauled her tow athwart the Packer's bow!

Certainly, the all sufficient answer, which her pilot made, was, that the tugs were approaching, *port to port.*

But the libellant is as strictly bound by the findings of fact, as we are; and one of these is, that the approach was *starboard to port.*

On the other hand, whatever is said against the Packer is conjectural; she *might* have gone out under a port

wheel; she might have sooner stopped, and reversed, &c.

But there is no need to take steps to avoid a collision, *until a collision is imminent* (the Scotia 14th Wall., 180–181); and some latitude should be given to navigators, or they must give up their trade.

To lay down an iron rule, which must be followed, is really to condemn, by anticipation, any vessel unfortunate enough to fall into a collision.

When a collision, easy enough to have been avoided, occurs, it is not righteous to let free the vessel guilty of glaring fault, and to condemn the other, on vague conjecture.

The Manistee (7th Biss., 37).

Fault is not to be presumed. It must be shown affirmatively.

The L. P. Dayton (120th U. S. R., 337).

The libellant was under obligation to show, that both tugs were to blame, or one of them.

A strong presumptive case was made against the Wolverton, because she was shown to have needlessly broken a rule of navigation.

We deny that the Packer was under obligation to port her wheel; we say, too, that her failure to do so was not a proximate cause of the collision.

We ask for a reversal of the decree of the Circuit Court.

McCarthy & Berier,
Proctors of the Claimant,
50 Wall street,
New York City.

FILED
APR 1 1891
JAMES H. MCKEE

United States Supreme Court

The Steamtug "E. A. PACKER," &c.,
JOHN SCULLY,
APPELLANT,

against

The NEW JERSEY LIGHTERAGE COMPANY,
APPELLEE.

BRIEF FOR APPELLEE.

ROBERT D. BENEDICT,
Proctor for Appellee,
68 Wall Street, New York.

NEW YORK:
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1891

United States Supreme Court.

THE STEAMTUG "E. A. PACKER," *impl'd*,
JOHN SCULLY,
Claimant and Appellant,
vs.
THE NEW JERSEY LIGHTERAGE CO.,
Libellant and Appellee.
No. 286.

POINTS FOR APPELLEE.

The libel in this case was filed by the New Jersey Lighterage Co., owner of the Barge *Atlanta*, and carrier of her cargo of sugar, against the steamtug *E. A. Packer*, and the steamtug *Dr. John Wolverton*, to recover the damages sustained by reason of a collision between the *Atlanta* and a barge in tow of the *Packer*, which occurred in the afternoon of October 25th, 1880, off the Battery, in the harbor of New York.

Process was issued against both of the tugs, but only one of them, the *Packer*, was seized, the *Wolverton* having left the jurisdiction. The owner of the *Packer* appeared and answered, and the cause was tried as to the *Packer* alone. The District Court decided that the *Packer* was not in fault, and dismissed the libel.

The libellant appealed to the Circuit Court, which reversed the decision of the District Court, and gave a decree against the *Packer*, and her owner has brought this appeal.

FACTS OF THE COLLISION.

The *Atlanta* was being towed by the *Wolverton* from Roberts' Stores, in Brooklyn, to Jersey City. She was towed on a hawser about fifteen to twenty-five fathoms in length. Her master, Parker, was steering her after the *Wolverton*. The tide was ebb. The *Packer* had brought two or three boats from Port Johnson, and had towed them up the North River to pier 9, where she left one or two, and came down the river again with one barge on her port side. She came round the Battery, as she alleged, about two hundred yards from the shore. Off the Battery, when the tide is ebb, there is an eddy between the North River tide and the East River tide. She rounded the Battery till she passed through this eddy. As she reached the edge of the ebb tide coming out of the East River, it must strike her on her port bow and swing her head off shore and carry her farther off, until in time the effect of her starboard helm would straighten her up against that ebb tide. Having done this, she was, as she says, off pier 1, East River, going slowly because "it was difficult for her to make head with her tow against the tide" (fol. 5), *i. e.*, the East River tide.

She then saw the *Wolverton* some 500 yards away, much farther out in the river, coming across from Brooklyn. She had the *Wolverton* and her tow on her starboard side, while the *Wolverton* and the *Atlanta* had the *Packer* on their port side.

In this situation, it was the duty of the *Packer* to keep out of the way. Of course, if she undertook to

do this by going ahead of the *Wolverton*, she did it at her peril, because she chose the more dangerous of the two modes possible to her. The Inspectors' Rules required her to keep back and port her wheel and pass under the stern of the *Wolverton* and her tow.

The *Packer* was in charge of "a very ignorant pilot," (fol. 69) and he chose the wrong course. He did not stop or check his engine, but put his wheel to starboard and kept on. The pilot of the *Wolverton* ported his wheel and kept on. The pilot of the *Packer* when within about two hundred feet reversed his engines and the *Wolverton* crossed clear ahead of him, but the *Atlanta* was struck broadside on by the barge in tow of the *Packer*, and from the effects of the collision she had to be beached, and she and her cargo of sugar sustained severe loss.

The *Packer* blew two whistles twice, but received no answer from the *Wolverton*.

FIRST POINT.

If the *Wolverton* were also before the Court, the owners of the *Atlanta* would have but little burden in this case. The *Atlanta* is not claimed to have been in fault, for though in the answer of the owners of the *Packer* in the District Court some charge of fault is to be found, yet in the Circuit Court it was abandoned, and no finding of fault on her part was requested, either as fact or law (Proposed Findings, fol. 59 to 63). If therefore both tugs were before the Court, they could be left to fight out between themselves the question whether the collision was caused by fault on the part of both tugs, or of either of them alone.

But as the *Packer* alone is before the Court, the question is reduced to the inquiry whether there was fault on the part of the *Packer*. And the owners of the *Atlanta* must bear the burden of showing that

there was fault on the part of the *Packer*. This burden they cheerfully assume.

SECOND POINT.

The courses of these vessels were crossing, and the *Packer* had the other on her starboard side.

a. The courses of the two vessels were as follows: the course of the *Wolverton* was about W. N. W., and that of the *Packer* about E. by N., a difference of three points.

These courses are found in the eighth finding (fol. 73). The finding as to the course of the *Packer* is not excepted to (Second Exception, fol. 77). And as to the heading of the *Wolverton*, which in that exception is claimed to have been W. instead of W. N. W. Schultz evidence as to his course makes it if anything N. W. by N., as the Circuit Judge first found it to be.

THIRD POINT.

Now where vessels are on crossing courses, the rule of the law is that the one which has the other on her starboard side, must keep out of the way of the other vessel.

She must take the necessary measures to accomplish that result, and she is chargeable with fault if she does not.

The *Packer* was bound therefore to take seasonable measures to avoid the *Wolverton* and the barge. Under the Inspectors' Rules she was bound to port her wheel and pass astern of them. She did not do this, but undertook to do the contrary. She failed in her endeavor, and the conclusion that she was in fault and liable for the damages follows.

FOURTH POINT.

None of the exceptions filed by the claimants to the findings of the Circuit Court are valid. So far as the exceptions relate to the findings of fact, in order to make the exception good, it must appear that there was no evidence to sustain it. But no such thing does appear.

a. The first exception (fol. 77) is to that part of the 7th finding of fact which holds that the *Packer* was 200 yards out from the shore when she saw the *Wolverton*, and that she was heading against the tide.

But the answer of the *Packer* averred that, "*as she was rounding the Battery* she was *not more than* 200 *yards*, or about that distance from the New York shore" (fol. 4), and that it was very difficult for her "to make head with her tow against the tide," and that *as she was rounding the Battery* she saw the *Wolverton* (fol. 5). Instead of its being undisputed that the *Packer* was in slack water, Slover, the pilot of the *Packer*, testified otherwise (fol. 30, 31, 32 and 35), and so did Schultz (fol. 56). The evidence of James S. Purnell (fol. 32) also sustains the finding.

b. The second exception is to the 8th finding that the tugs were on crossing courses, converging towards the New York shore, the *Packer* having the *Wolverton* on her own starboard bow, and the *Wolverton* heading W. N. W. But there was evidence to sustain each of these facts.

Slover testified that the *Packer* was going up against the ebb tide (fol. 31), and the *Wolverton* was on his starboard bow, and that she had the *Packer* on her port bow (fol. 31, 34, 37). And Schultz gives the course of the *Wolverton* as "W. by N., or W. N. W" (fol. 28),

and says the *Packer* was heading "right up against the tide" (fol. 56 and 28).

If the *Packer* was heading up against the tide, having the *Wolverton* on her starboard bow, and the *Wolverton* was heading W. N. W., their courses must have been converging towards the New York shore.

c. Exception is also taken to the 8th finding that the *Wolverton* was farther out from the New York shore than the *Packer*.

But the *Packer's* answer so alleged (fol. 5).

d. The third exception is to the finding that when the *Wolverton* ported her wheel, danger of collision was imminent.

Schultz says that the *Packer* was ahead of his port bow about 300 or 400 yards off when he saw her, and that she starboarded her wheel and changed her course across his bow four or five points, whereupon he ported (fol. 23). This is abundant to show that danger of collision was imminent.

e. The fourth exception is to the finding that the place of collision was 400 or 500 feet instead of 200 feet, off the ends of the piers.

Parker testified that the place of collision was 200 or 300 yards from the Barge office (fol. 19 and 20). Ackerly said about 300 yards off pier 1 (fol. 30). James E. Purnell said about 300 feet (fol. 32).

James S. Purnell said about 350 feet (fol. 33).

Aside from the evidence as to the courses of the two vessels, here is abundant evidence to sustain the finding.

f. The fifth exception is to the finding that there was no local usage of navigation applicable to the situation of the vessels when they discovered each other.

But Connors (fol. 41), Devine (fol. 41), Simms (fol. 43) and Gavin (fol. 43) all so testified.

g. The sixth exception is to the 13th finding as being contrary to the fact.

But Hansell testified that the line between the ebb tide and the slack water was 400 feet at least out from the Barge office (fol. 51), and Slover testified that the *Packer* was not in the eddy (fol. 35).

FIFTH POINT.

Nor are the exceptions to the conclusions of law contained in the seventh exception any more valid.

a. The first conclusion of law is excepted to because the tugs were not on crossing courses. But the fact has been found that they were on crossing courses.

It is also excepted because (it is claimed) the *Packer* did observe her duty of keeping out of the way.

But the vessels being on crossing courses, as shown in the diagram (p. 34), the boat A, which represents the position of the *Packer*, is required to avoid the other by Statute, and by the Inspectors' Rules. And by the Inspectors' Rules the *Packer* was required to port her helm and go under the stern of the *Wolverton* and her tow, instead of starboarding and trying to cross her bows.

b. The exception to the second conclusion of law is fully answered by the same considerations.

SIXTH POINT.

The eighth exception is that the findings of fact do not sustain the conclusions of law.

This exception does not state the findings accurately. It states that the courses of the vessels were "starboard to starboard," whereas in the eighth finding it is found that "the *Wolverton* had the *Packer* on her *port* bow."

It is also found that when the vessels were 500 yards apart and so crossing, the *Packer* starboarded her wheel, and ran without checking her speed till within 200 feet of the *Wolverton*.

That a vessel whose duty it was to avoid the other should do this, clearly charges her with fault.

And the case of *The Galatea* (92 U. S. 439) is an authority to show that by reason of the tide as well as of crossing courses, it was the duty of the *Packer* to avoid the collision.

SEVENTH POINT.

There was no error in the refusals to find.

a. The ninth exception is to the refusal to find the first (additional) proposed finding.

This finding appears to present a request to the Court to put a certain construction on the evidence of Capt. Schultz which is not a necessary nor a reasonable one.

His first statement was that he crossed the river to a point two or three hundred feet off from pier 2 or 3, which is contrary to this proposed finding. And there was plenty of evidence to oppose to this proposed finding as to distances. All the evidence, for instance, which put the *Packer* on the *Wolverton's* port bow.

And, moreover, the chart shows that the course which the Court was asked to find was an *impossible* one. A

line from Roberts' Stores to Communipaw ferry crosses the Battery.

b. The tenth exception is to the refusal to find the third (additional) proposed finding.

The same answer holds good to this as to the previous one.

It is a quite sufficient suggestion that both of these proposed findings overlook the fact testified to by Schultz, that when he started he went up the river in the eddy tide as far as Harbeck's Stores, and started to cross the river from Harbeck's Stores and not from Roberts' Stores (fol. 25).

c. The eleventh exception is to a refusal to find the fourth finding as to the set of the ebb tide.

Evidence is given as to the set of the ebb tide *off Roberts' Stores* (fol. 29), that is, on the Brooklyn side of the river; but that was utterly immaterial to the question in the case.

d. The twelfth exception to an alleged refusal to find the fifth proposed finding has no foundation. The Court did find it in substance (6th and 8th findings).

e. The thirteenth exception to a refusal to find how much the *Wolverton* changed her course under her port wheel is untenable, because it is not of the slightest consequence. The distance was only 200 feet. The faults which caused the collision had all been committed before that.

f. The fourteenth exception to a refusal to find the seventh proposed finding is untenable.

There was abundant evidence that the place of collision was farther out than 200 feet as the proposed finding stated.